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THE UNIVERSITY OF ALBERTA

COMPARATIVE EMERGENCY LEGISLATION AND THE ENTRENCHMENT QUESTION

by

©

ASHISH SHUKLA

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
AND RESEARCH IN PARTIAL FULFILMENT OF THE
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THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled COMPARATIVE EMERGENCY LEGISLATION AND THE ENTRENCHMENT QUESTION by ASHISH SHUKLA in partial fulfilment of the requirements for the degree of Master of Laws.

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TO MY MOTHER

ABSTRACT

Both Canada and India are democratic countries having federal Constitutions. Besides, both have a legal system based on British law and justice. Furthermore, both the systems have provisions in their respective Constitutions whereby overriding powers, not always in conformity with teh normal constitutional principles, may be assumed by the federal Parliament in a time of a grave national emergency. In this thesis those provisions of the Constitutions which enable the federal Parliaments of these two countries to assume extra powers to counter a state of emergency have been analyzed. The consequences of such an action, especially on individual rights and federal-provincial relations have also been elaborated.

It is acknowledged that exigency of time may demand drastic action from the government, but at the same time it is emphasized that even in a time of grave national emergency, the powers available to deal with it should not exceed a certain limit. Otherwise, the effect could be dictatorial as demonstrated by the October, 1970, invocation fo the War Measures Act to deal with the Quebec crises in Canada and the June, 1975, proclamation on the ground of internal disturbances in India. Both these events have been dealt with in considerable detail as both have many similarities and also indicate that the use of emergency measures in peace time is not always a rewarding experience, especially for the innocent individual who may get caught in the unfettered sweep of the Executive power. Ironically, any or all such actions have constitutional sanction in the name of national emergency.

Accordingly, suggestions have been put forward for changes in the respective systems which, without affecting the power of the government during a time of acute national crises such as war or external aggression, make out a case for complete elimination of the use of emergency powers to counter "insurrection" or "internal disturbances". The study of emergency provisions comprises the first part of the thesis.

In the final part of the thesis, the issue relating to the entrenchment of the Bill of Rights in the Canadian Constitution has been discussed. Starting from the meaning and purpose of the Bill of Rights and discussing the common law protections available against the infringement of individual rights and freedoms in this country, this part makes a strong case for entrenchment. One of the major reasons advanced in support of an entrenched Bill of Rights is the inaffectiveness of the present one which has been elaborated by discussing important court decisions and other related issues. The attempts made by the previous federal government towards an entrenched Bill of Rights and its contents have been detailed with almost complete endorsement. As the entrenchment question is direvtly related with the amending procedure for the Constitution and the process of constitutional revision, these two topics have also been covered. The thesis concludes with a series of recommendations and other suggestions.

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INTRODUCTION

An attempt has been made in this thesis to (i) analyse the emergency provisions contained in the Canadian and the Indian Constitutional Systems and (ii) to study the issue relating to the entrenchment of a Bill of Rights in the Canadian Constitution.

Chapter one mainly deals with the emergency provisions of the Indian Constitution. However, for a better understanding of the subject, a short introduction of the historical development and the nature of the constitution has been given at the beginning of the Chapter. Included in this Chapter is a detailed analysis of the proclamation of a state of national emergency in June, 1975, on the ground of "internal disturbances", its consequences and criticism.

In Chapter two, the emergency provisions in the Canadian Constitutional System have been discussed, For this purpose, nature and scope of the "peace, order and good government" Clause of Section 91 of the British North America Act, which forms the basis of the authority for the emergency doctrine in this country, has been outlined. The War Measures Act, which is the enabling statute to deal with war and insurrection, real or apprehended has also been discussed with special reference to its invocation in October, 1970, to counter the F.L.Q. Crisis in Quebec. An attempt has been made to draw analogies between the two systems and indicate their weaknesses.

Chapter three is devoted to the study of the entrenchment question. In this Chapter, an attempt has been made, after taking into the account the meaning and purpose of Bill of Rights, to establish that the present Bill of Rights in Canada has failed to accomplish its ideals. For greater protection of individual rights and freedoms in this country, a case has been made out for their entrenchment in the Constitution. The federal government's position on the issue and the others which are directly linked with the entrenchment question, like the Constitutional revision and the amending formulae, have been researched and incorporated in this Chapter with almost complete endorsement.

The fourth Chapter contains resume, critical analysis and recommendations for reform.

CHAPTER ONE

I. INDIAN CONSTITUTION

A. Historical Retrospect

An introduction to the law of the Constitution of India may conveniently begin with the Government of India Act, 1919, (hereinafter referred to as G.I. Act, 1919), since that Act for the first time declared "responsible government as an integral part of British Empire"[1] to be the goal of the constitutional development in India. As a first step, the Act for the first time placed certain subjects under the control of elected Ministers and gave to the provinces also for the first time, a quasi independence of the centre by alloting to them separate administrative and legislative spheres.[2] The separation of legislative spheres effected by the Devolution Rules framed under the Act was to furnish the basis for the distribution of legislative powers for the federal Constitution which was introduced in India by Government of India Act, 1935[3] (hereinafter referred to as G.I. Act, 1935). The G.I. Act, 1935, inturn, formed the basis of the present constitution.

The G.I. Act, 1919, failed to satisfy the political aspirations of India. Though the Act required that ten years after it was passed, a committee should be appointed to look into its working but this period

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1. See the preamble to the Govt. of India Act, 1935.
2. U.P. v. Governor General in Council (1939) F.C.R. 124, 127-218.
3. Seervai, H.M., Constitutional Law of India, Vol. 1, (1975) p 1.

of ten years was shortened and a commission presided over by Sir John Semoin, M.P. and comprising of five members of the House of Lords was appointed which submitted its report on May 27, 1930.[4] Meanwhile a Labour Government had come into power in Great Britain, and on October 31, 1929, the Viceroy, Lord Irwin, announced its decision to hold a Round Table Conference in England for the solution of Indian problem, and also announced, with the concurrence of His Majesty's Government that Dominion status was the goal of Indian political development.[5]

However, the three Round Table Conferences which were held in England failed to produce a scheme acceptable to the principal parties, and the British Parliament imposed its own solution by enacting the G.I. Act, 1935.[6] The Act marked a radical change of policy in two respects: first, it introduced a federal form of government in place of the unitary form which had been a feature of British Rule in India, and, secondly the Act was not limited to British India but envisaged a federation to which the native states of India would accede.[7] In view of the federal form of government envisaged at the centre, the Provinces were endowed for the first time with a legal personality. Dyarchy was abolished, and all the provincial subjects were transferred to popular control. Certain 'special responsibilities' were, however, laid upon the Governors as before in respect of the protection of minorities etc., and adequate powers, legislative and administrative were vested in them for their proper discharge.[8] But, because of the lack of agreement between the political parties in the federal form embodied in the G.I. Act, 1935 and the 'special responsibilities' and 'safeguards' given to the Governor General, the federation never came into being. Nevertheless the Act did bring into Indian polity the spirit of federalism, the merits of which were only realised when India gained independence and the G.I. Act, 1935 provided the framework for a federal government. "The most important survival from the 1935 Act is the distribution of legislative powers between the Centre and the Provinces."[9]

---

[4] Gwyer and Appadorai, Speeches and Documents on Indian Constitution 1921-47, Vol. 1, p xxxvii, see also pp 210-213.

[5] Ibid., p xxxviii.

[6] It came into force in April, 1937.

[7] Seervai, Supra, n. 3, p 2. India for centuries, till it became a Republic in 1950 was an agglomeration of princely states where feudal monarchy was practiced. During the British Rule, although many of such states acceeded to the Crown and became part of British India, others retained their identity but accepted overall supremacy of the Crown and paid taxes to it.

During World War II, the mood of the Indian people became increasingly one of self-assertion, of a readiness to take its destiny into its own hands. In such a mood, even more than previously, Indians would accept only a Constitution drafted by themselves.[10] In order to arrive at a political settlement with India, the British Parliament in 1942, sent a mission led by Sir Stafford Cripps but it failed to evolve a political solution,[11] and it was not till after the war was over that the search for a political settlement was resumed.

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[8] Gwyer and Appadorai, Supra, n. 4, p XLiii. System of "dyarchy" or "dual rule" is explained thus: Provision was made in the G.I. Act, 1919 for classifying subjects as central and Provincial. Provincial matters were divided into "transferred subjects" administered by Governor and his ministers responsible to the Legislative Council. The Governor, however, could override both the ministers and the Executive Council. He could also secure legislation on reserved subjects notwithstanding that the Council has consented thereto.

[9] Gledhill, Alan, The Republic of India (1965), p 33.

[10] Austin Granville, The Indian Constitution - Cornerstone of a Nation (1966), p 2.

The greatly increased demand for self-determination by the Indians led the newly elected Labour Government in Britain to announce in September, 1945, that it was contemplating creation of a constituent body in India and ordered that national elections be held during the winter so that freshly created provincial legislatures would be ready to act as electoral bodies for a Constituent Assembly.[12] The London Government followed this move in January, 1946, by sending a cabinet mission led by the Secretary of State for India, Lord Pethick-Lawrence. The mission, however, failed to find an agreed solution and on May 16, 1946 it presented a scheme of its own which would ensure a speedy setting up of the new Constitution. The scheme laid down the principles and procedures for framing a Constitution for India through a duly elected Constituent Assembly. While recommending the basic form of the Constitution it suggested that, (a) there should be a Union of India, embracing both British India and the states which should deal with the following subjects: foreign affairs, defence, and communications, and should have the powers necessary to raise the finances required for the above subjects, (b) the Union was to have an Executive and a legislature constituted from British India and state representatives, with a prescribed procedure for deciding any question raising a major communal issue in the legislature, (c) all subjects other than the union subjects and all residuary powers should rest in the provinces. To frame the Constitution on the guidelines suggested, the Cabinet Mission also devised a scheme for the election and working of the Constituent Assembly and also announed the personnel of the interim government. However, the Mission acknowledged that by doing all this it is only setting "in motion machinery whereby a Constitution can be settled by Indians for Indians".[13]

---

[11] The proposals that Cripps but forward were not accepted for a variety of reasons, but Cripps for the first time made it clear that Indians would write their own Constitution. See Gwyer and Appadorai, Supra, n. 4, Vol. II, p 566.

[12] The policy and the general dates of the forthcoming elections were announced by the then Viceroy, Lord Wavell on 19th September, 1945 (Ibid., p 567).

Elections to the Constituent Assembly were held in accordance with the procedure prescribed in the Cabinet Mission plan and the Constituent Assembly held its first sitting on December 9, 1946. But by then partition of British India on communal basis seemed inevitable and the Constituent Assembly was boycotted by the Muslim League which championed the cause of a separate Islamic State - Pakistan.[14] The major political parties accepted partition, though the Indian National Congress tried till the last to avoid it.[15] This was followed by large scale communal riots in northern and the eastern parts of the country and prompted the British Parliament to transfer the power swiftly by passing the Indian Independence Act, 1947.

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[13] Ibid., pp 580-581, see also B. Shiva Rao - The Framing of India's Constitution - A Study, (1966), p 67.

[14] See the Statement of Mr. Jinnah, President of Muslim League, 21st November, 1946, Ibid., p 657.

[15] See the resolution of the Working Committee of Indian National Congress, 6-8 March, 1947, Ibid., p 669.

The Indian Independence Act, 1947, created two independent Dominions of India and Pakistan,[16] divested His Majesty's Government in the United Kingdom of responsibility of the territories which immediately before August 15, 1947, were included in British India,[17] made temporary provisions for the government of each Dominion and provided that the powers of the legislature of the Dominion were for the purposes of making provision for the Constitution of the Dominion, to be exercisable in the first instance of the Constituent Assembly of that Dominion.[18]

On August 29, 1948, the Constituent Assembly of India appointed a drafting committee which presented a draft Constitution. After considerable discussion, the draft as amended and altered was adopted by the Constituent Assembly on November 26, 1949. Certain Articles of the Constitution came into force immediately, the remaining Articles and the preamble came into force on January 26, 1950.[19] The working and the atmosphere of the Constituent Assembly has been best described by Granville Austin, who states:[20]

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[16] Sec. 1

[17] Sec. 7(a) read with Sec. 1(b)

[18] Sec. 8(1)

[19] Article 394.

[20] Austin, Supra, n. 10, p xiii.

> The Constituent Assembly was able to draft a constitution that was both a declaration of social intent and an intricate administrative blue-print because of the extraordinary sense of unity among the members. The members disagreed hardly at all about the ends they sought and only slightly about the means of achieving them, although several issues did produce deep dissension. The atmosphere of the Assembly, generally speaking, was one of trust in the leadership and a sense of compromise among the members. The Assembly's hope, which it frequently achieved was to reach decisions by consensus. And there can be little doubt that the lengthy and frank discussions of all the provisions of the future constitution by the Assembly followed by sincere attempts to compromise and to reach consensus, have been the principle reasons for the strength of the constitution.

B. Nature of the Constitution

The Constitution is essentially federal in form because it declares "India, that is Bharat, shall be a union of states".[21] However, because of the strong unitary tendencies, some of the political scientists do not consider the Indian Government as true federation at all. They contend that because some of the powers given to the centre are so drastic that at the most the Constitution can be described as "quasi-federal".[22] This is, however, not completely true because the commentators tend to overlook that such unitary tendencies were necessitated by the circumstances existing prior to 1947 and the conditions in which the Constitution was framed. It was a tremendous task for the Constitution makers to reconcile diverse language, religion, and culture of the people of India and this would have been impossible without a strong centre.

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21. Article 1.

22. See Where, K.C., Modern Constitutions (1966), p 21.

The situation has been aptly described by Durga Das Basu, who states:[23]

> Federation, under Indian Constitution is the resultant of conflicting forces. The political tradition of the country was unitary, but it was not possible to adopt a unitary constitution, since it was necessary to fit in the Indian States (about 600 in number) which had become practically independent since the lapse of paramountcy as the result of the Indian Independence Act. Above all, a strong central government had been necessitated by the situation created by the partition. Though the objective resolution adopted by the Constituent Assembly at the outset envisaged that the units of the Union of India should be 'autonomous' and rested with residuary power. But the framers of the Draft Constitution had to depart from the federal concept embodied in the objective resolution owing to a change in political situation which had taken in the meantime.

Further, rigidity which is a defect inherent in federalism is mitigated to a certain extent by the unique character of the Indian Constitution. It provides for three legislative lists, concurrent as well as exclusive legislative powers,[24] empowers the parliament to legislate on exclusive state matters[25] and to proclaim a state of emergency,[26] permits the operation of various provisions in the Constitution unless declared unoperative by the Parliament and lays down a procedure for the amendment of the Constitution.[27] The residuary powers (as in Canada) are also with the Union.[28]

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[23] Basu, D.D., Commentary on the Constitution of India (1961), Vol. 1, p 29. See also V.N. Shukla, The Constitution of India (1978) pp LX-LXX.

[24] Article 246.

[25] Article 249, 250 and 252.

[26] Article 352 and 353.

[27] Article 368.

[28] Article 248.

C. Distribution of Legislative Powers

The distribution of legislative power generally proceeds on the basis of allocating enumerated powers to one authority (the Union or the States), and residuary power to the other. In the United States "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".[29] The powers were thus mutually exclusive and it was left to judicial interpretation to imply a limited field of concurrent legislative action. The Canadian Constitution, while giving the residuary powers to the Dominion, nevertheless contains a double enumeration of exclusive legislative powers in Sections 91 and 92 which has often given rise to serious legal controversies. In order to avoid any such controversies, the framers of the Indian Constitution attempted an exhaustive enumeration of heads of legislative subjects and distributed them in three legislative lists.

According to the scheme of distribution, Parliament has the exclusive power to make laws with respect to any of the matters contained in the Union list,[30] the legislature of the State, has exclusive power to make laws with respect to any of the matters enumerated in the State list (List II)[31] and both Parliament and the State legislature have power to make laws with respect to the matters contained in the concurrent list (List III).[32] However cls, (2) and (3) of

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[29] The tenth amendment to the Constitution.

[30] Article 246(1) and Schedule 7, List I.

[31] Article 246(3) and Schedule 7, List II.

[32] Article 246(2) and Schedule 7, List III.

Article 246 which spells out the scheme of distribution, lays down the principle of federal supremacy, viz., that in case of inevitable conflict between Union and State powers, the Union powers as enumerated in List 1 (Union List) shall prevail over the State powers as enumerated in Lists II (State List)[33] and List III (Concurrent List),[34] and in case of overlapping between lists III and II, the former shall prevail.

But the principle of federal supremacy laid down in Article 246(1) of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between enteries in the Union and the State Lists.[35]

D. The Judiciary

The members of the Constituent Assembly brought to the framing of the judicial provisions of the Constitution an idealism equalled only by that shown towards fundamental rights. The judiciary was seen as an extension of the rights, for it was the courts that would give the right force. The judiciary was to be an arm of social revolution, upholding the quality that Indians had longed for during colonial days, but had not gained.[36]

Accordingly, the Constitution itself makes the provision for the establishment of High Courts in the States and a Supreme Court at the Centre.[37] It also lays down the mode of the appointment of the judges, their tenure, their salaries and the requisite qualifications, thus making the judiciary independent of legislative or executive control. Besides having the appellate civil and criminal jurisdiction, and a right of judicial review, both these courts are empowered to issue directions, orders and writs in the nature of *habeas corpus*, *mandamus*, prohibition, *certeorari* or quo warranto to any person or authority, including in appropriate cases, any government for the enforcement of any of the fundamental rights. The High Courts can issue these writs for other purposes also subject to the provisions of the Constitution. Moreover, Article 32 which provides for an individual to move the Supreme Court to enforce the fundamental rights, is a fundamental right itself thus ensuring complete guarantee of judicial review in case of infringement of fundamental rights by State action.[38]

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[33] Sudhir Chandra v. Wealth Tax Officer, Calcutta, AIR 1969 SC 59.

[34] Gujrat University v. Sri Krishma, AIR 1963 SC 703.

[35] State of Bombay v. F.N. Balsara, AIR 1951 SC 318.

[36] Austin, Supra. n. 10, p 164.

[37] Article 124 and Article 214.

II. THE EMERGENCY PROVISIONS

The effect that India's peculiar situation had on the shape of her federal system is nowhere more apparent than in the emergency provisions of the Constitution, by which the distribution of powers can be so drastically altered that the Constitution becomes unitary rather than federal.[39] This is because the Constitution-makers were aware that after the termination of the Second World War, the age of cold war had begun and there was a constant fear of conflict between two giant powers of the world: the U.S.S.R. and the United States. Science and technology was also making breathtaking progress and the atomic age had begun. They were, therefore, apprehensive of the fact that an external threat, either of a military or an ideological character, may have to be faced by India; and so they were anxious to provide for emergency powers which would enable the Union Government to put whole of the country on a war-footing and enable it to face any possible danger.[40]

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[38] See Chapters IV and V of the Indian Constitution which deal with the Union and the State Judiciary respectively.

[39] Austin, Supra, n. 10, p 207.

Further, the framers of the Constitution had, soon after India become free and Pakistan separated from her, witnessed the orgy of violence which disturbed both countries and they were determined to see that internal commotion or disturbance should not be allowed to overtake the country or any part of it. That is why they thought it was necessary to provide for emergency powers to deal with situations which may arise not merely as a result of an external aggression, but also as a result of internal disturbance.[41] It is as a result of these two paramount considerations that part XVIII was drafted by the Constitution-makers to deal with emergency problems.

A. The Actual Provisions and their Kinds

Part XVIII comprising of nine Articles lays down the procedure whereby an emergency situation, real or apprehended can be dealt with by the Parliament. There are three kinds of emergencies contemplated by the Constitution. They are (I) an emergency due to external aggression or internal disturbances,[41] (II) failure of constitutional machinery in the States, (III) financial emergency.

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[40] Gajendragadkar, P.B., The Constitution of India - Its Philosophy and Basic Postulates, (1969) p 68.

[41] Substituted by the words "armed rebellion" by the Constitution (44th Amendment) Act, 1978.

(I) Emergency due to external aggression or internal disturbances.[41] Article 352 provides that if the President is satisfied that a grave emergency exists whereby the security of whole or part of India is threatened by war, external aggression or internal disorder,[41] he may by proclamation make a declaration to that effect. Such a proclamation must be laid before each House of Parliament,[42] and ceases to operate at the expiration of two months unless before that time it has been approved by resolution of both Houses of Parliament.[43] However, if the proclamation is issued when the House of the People has been dissolved, then, if the Council of States has approved the resolution before the expiration of the period of two months, the proclamation ceases to operate on the expiration of thirty days from the date from which the House of the People first sits after its reconsititution unless before that time the House has approved the resolution.[44] A proclamation of emergency can be made before the actual occurrence of war, external aggression or internal disorder if the President is satisfied that there is imminent danger thereof. A proclamation can be revoked by a subsequent proclamation.[45]

The constitution (38th Amendment Act), 1975 and the constitution (42nd Amendment Act), 1976 inserted into the Article 352 certain provisions to remove the doubts which existed then. The 38th Amendment Act

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42. Article 352, Clause (2)(b)

43. Ibid., Clause (2)(c)

44. Ibid., proviso to Clause (2)

45. Ibid., Clause (3)

provided that more than one proclamation under Article 352(1) can be made to operate simultaneously in view of different contingencies and the subjective satisfaction of the President,[46] which is a condition precedent for making of a proclamation under Article 352, cannot be questioned in the courts on any ground, such as malafides; or non-existence of any internal disturbance or external aggression, in fact. The 42nd Amendment Act made it clear that when a disturbance or aggression was confined to a particular area, a proclamation of emergency could be made with respect to that area only, without affecting the normal conditions in the rest of India.

Thus, a proclamation of emergency can be issued either after the emergency has arisen or it may be issued when there is imminent danger thereof. In regard to both these conditions, the satisfaction of the President is decisive. The President who is in a similar position as the Governor General of Canada, is only a formal executive head of the government, but in reality exercises his power on the advice of the Council of Ministers.[47]

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46. The Supreme Court of India has held that Article 352 required only a declaration threatening the security of India by one of the causes mentioned in the Article. That power could be exercised only when the President was satisfied as to an emergency, but it was not a condition precedent to the exercise of the power that the President's satisfaction should be stated in the declaration (P.L. Lakhanpal v. Union of India (1966) Supp. SCR 209).

47. See Article 74(1) which states: "There shall be a Council of Ministers with the Prime Minister at the head to aid and adivse the President, who shall, in the exercise of his functions act in accordance with advice."

B. Effects of the Proclamation

The effects of a proclamation of emergency may be discussed under four heads (i) Executive, (ii) Financial, (iii) Legislative, (iv) As to Fundamental Rights.

(i) Executive: When a proclamation of emergency has been made, the executive power of the Union shall, during the operation of the proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised.[48]

In normal times, the Union Executive has the power to give directions to State which includes only the matters specified under Articles 256-7.[49] But under a proclamation of emergency, the Government of India shall acquire the power to give directions to a State on 'any' matter and the administration of the country, till the proclamation is in operation, will function as under a unitary system with local subdivisions. Further, during the last proclamation of emergency on account of internal disturbances (which has been dealt with in greater detail in the following pages), Article 257-A[50] was inserted in the Constitution empowering the government of India to deploy an armed forces of the Union or any other force subject to the control of the Union for dealing with any grave situation of law and order in any State. This provision besides arming the Union with a permanent coercive power which can be used at any time, adds another centripital force to the federal structure by permitting the Union government to interfere with the maintenance of law and order which was the exclusive responsibility of the states concerned.[51]

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[48] Article 353(a).

[49] Matters specified under Article 257 relate to the maintenance and control of national highways, waterways and communications.

[50] Vide Constitution (42nd Amendment) Act, 1976.

(ii) Financial: While the proclamation of emergency is in operation the President may by an order direct that all or any of the provisions relating to the distribution of revenue (Articles 268 to 279) shall for a specified period, (which cannot extend in any case beyond the expiration of the financial year in which such a proclamation ceases to operate), have effect subject to such exception or modification as he thinks fit. Every such order after it is made must be laid before each House of Parliament.[52] This provision for the modification of the scheme of distribution of revenue between Union and the State is made with a view to secure adequate revenues for the Union to meet the situation created by the emergency.

(iii) Legislative: During a proclamation of emergency, Parliament may by law extend the normal life of the House of People (the Lok Sabha) for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation has ceased to operate.[53]

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[51] Prior to 1976, Public Order and Police were under the Control of States (Entry 1 and 2 of List II), but with the Constitutional amendment referred to above the position was drastically altered. However, Constitution (44th Amendment) Act, 1978, has repealed Article 257-A.

[52] Article 354.

[53] Article 83(2). The normal term of Lok Sabha (the Lower House) which is five years was extended to six years by the Constitution (42nd Amendment) Act, 1976. This, however, has been rechanged to five years vide the Constitution (43rd Amendment) Act, 1977. Under the B.N.A. Act such an extension is possible under Section 91(1).

Moreover, as soon as a proclamation of emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitations imposed as regards List II (State List), by Article 246(2) shall cease to have effect: Article 250. In other words, during the operation of the proclamation of emergency, Parliament shall have power to legislate on state matters as well. However, the power conferred by Article 250 on Parliament does not restrict the power of a State to make any laws, which it has power to make, but if a State law made before or after a law made by Parliament under Article 250 was repugnant to such law, the State law would be void to the extent of its repugnancy during the time that the law made by Parliament continued to be operative.

Thus, the net effect of the above provisions is that although the proclamation does not suspend the State legislatures, it suspends the distribution of legislative powers between the Union and the State so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary, as if the Constitution was Unitary.[54]

(iv) As to Fundamental Rights: Perhaps the most noticeable effect of the proclamation of emergency is the suspension of some of the fundamental rights in the country. Before such a consequence is discussed in detail, it shall be necessary to give a short introduction to their origin and status.

There were no fundamental rights under any of the Government of India Acts because they were founded on the English doctrine of sovereignty of Parliament which was repugnant to any limitations upon the authority of Parliament, by way of safeguarding individual rights. For the same reason, the Simon Commission had rejected the idea of enacting declarations of fundamental rights on the ground that they were practically useless. But nationalist opinion, since the time of Nehru Report[55] was definitely in favour of an entrenched Bill of Rights, because the experience gained from the British regime was that a subservient legislature might occasionally help the Executive in committing inroads upon individual liberty.

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[54] Basu, D.D., Introduction to Constitution of India, Third ed., p 162.

So, the Constitution of India followed the American precedent and enacted fundamental rights in the Constitution itself.[56] These rights are available not only against the Executive but also are limitations upon the powers of the legislature. But unlike the Bill of Rights incorporated in the Constitution of the United States, all the rights guaranteed under the Indian Constitution are not absolute and they do not guarantee unenumerated or 'natural' rights as provided for the 9th Amendment to the United States Constitution. Rather, they effect a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy. Accordingly, the Indian Parliament cannot be said to be sovereign in the sense of legal omnipotence because its powers are limited by a written constitution which has imposed prohibitions on the powers of the Parliament by incorporating the fundamental rights in the written text and by providing effective means for their enforcement, but on the other hand there is a provision[57] by which the major portion of the Constitution can be amended by Union Parliament by special majority, if in any case, the judiciary proves too obtrusive. While doing so the Union Parliament is not only a legislative body but is also a constituent body and has power to amend any part of the Constitution including the fundamental rights. However, it cannot amend the "basic features" of the Constitution.[58]

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[55] Report of Nehru Committee (1928). See Gwyer and Appadorai, Supra, n. 4, pp 241-243.

[56] They form part III of the Constitution which comprises 24 Articles.

[57] Article 368.

Part III of Indian Constitution, which deals with fundamental rights, consists of 24 Articles which are arranged under eight subheadings as follows (1) General: Articles 12 and 13, (2) Right to Equality: Articles 14 to 18, (3) Right to Freedom: Articles 19 to 22, (4) Right against Exploitation: Articles 23 and 24, (5) Right to Freedom of Religion: Articles 25 to 28, (6) Cultural and Educational Rights: Articles 29 and 30, (7) Right to Property: Article 31,[59] (8) Right to Constitutional Remedies: Articles 32 to 35. It is outside the scope of this thesis to discuss each and every fundamental right reffered to above. However, Articles 14 and 19[60] to 22 which are generally affected by a proclamation of emergency will be dealt with in some detail.

Article 14: It States that "The State shall not deny to any person equality before the law or equal protection of all laws within the territory of India".

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[58] See Keshwanand Bharti v. State of Kerala AIR 1973 SC 1461 and Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299.

[59] The heading "Right to Property" and Article 31 have been omitted by Constitution (44th Amendment) Act, 1978.

[60] Article 19 is automatically suspended when a proclamation of emergency is made.

Thus we find two identical but not similar phrases, "equality before the law" and "equal protection of all laws". "Equality before the law" is an English concept which is stated in the negative and implies the absence of, and denies any special privilege in favour of any individual or class. On the other hand, "equal protection of the laws" is the American concept which is stated in the positive and implies equality of treatment in equal circumstances. In effect, Article 14, prohibits class legislation but not legislative classification for the purposes of legislation.[61] If the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to "well-defined class" it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.[62]

However, the Supreme Court of India has held that to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statue in question.[61-63] Therefore, there may be different treatment for different persons, depending upon geographical area,[64]

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61. Badhan v. State of Bihar, AIR 1955 SC 191, see also Chiranjit Lal v. Union of India, AIR 1951 SC 41.

62. State of W.B. v. Anwar Ali Sarkar AIR 1952 SC 75; Kathi Raning Rawatv. State of Saurashtra, AIR 1952 SC 123.

63. Hanif v. State of Bihar, AIR 1958 SC 731.

64. Joshi v. State of M.P., AIR 1955 SC 334.

historical period,[65] difference in time,[66] occupation[67] or age.[68]

Article 19:

Article 19(1) guarantees to every citizen the 'democratic freedoms'.[69] Every citizen has a right:

(a) to freedom of speech and expression

(b) to assemble peaceably and without arms

(c) to form associations or unions

(d) to move freely throughout the territory of India

(e) to reside and settle in any part of the territory of India

(f) to acquire, hold or dispose of property, and

(g) to practice any profession, or to carry on any occupation, trade or business.

However, clause 2 provides for "reasonable restrictions" which can be placed upon these freedoms in the interest of the country or of the general public.[70] The object of such restriction is to "strike a balance between individual liberty and social control" because there "cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder". However as the restrictive clauses are exhaustive they are to be strictly construed.[71] It should be noted that this Article refers only to the citizen's rights, which has been interpreted to mean that a corporation is not a citizen whereas its shareholders are.[72]

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[65] Mohan Lal v. Man Singh, AIR 1962 SC 73.

[66] Ramji Lal v. Income Tax Officer, AIR 1951 SC 97.

[67] Chiterlekha v. State of Mysore, AIR 1964 SC 1823.

[68] In re Anthony, AIR 1963 Mad. 308.

[69] Gledhill, Supra, n. 9, p 185.

[70] For example Article 19(1)(a) guarantees the freedom of speech and expression but this would not prevent any State from making any law which imposes reasonable restriction on such a right if the restriction is in the interest of Sovereignty and integrity of India, security of State, friendly relations with Foreign States, public order, decency or morality, or in intention to contempt of court or incitement to an offence. Similar, though less extensive restrictions may be placed on other freedoms: Article 19(3) to 19(6).

The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision of the Court.[73] But restrictions, which are imposed for securing the objects which are enjoined by the Directive Principles of State Policy included in Part IV of the Constitution have altogether been taken out of the protection of Article 19, by Article 31C.[74]

Article 20 of the Indian Constitution guarantees protection in respect of conviction of offences.

Clause (1) sets two limitations upon the law making power of every legislative authority in India as regards retrospective, criminal legislation. It prohibits (i) the making of expost facto criminal law, (ii) the infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed.[75]

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[71] A.K. Gopalan v. State of Madras, AIR 1950 SC 27. See also P.T.I. v. Union of India, AIR 1974 SC 1044.

[72] Tata Engineering Co. v. State of Bihar, AIR 1965 SC 1451.

[73] Chintamani Rao v. State of M.P., AIR 1951 SC 118.

[74] Vide Constitution (42nd Amendment) Act, 1976.

[75] Shiv Bahadur v. State of U.P., AIR 1955 SC 446.

Clause (2) provides immunity from double punishment *(double jeopardy)*. It guarantees that no person be prosecuted and punished for the same offence twice.[76]

Clause (3) guarantees accused's immunity from being compelled to be a witness against himself *(right against self incrimination)*. This clause gives protection, -

(i) to a person 'accused of an offence'
(ii) against compulsion 'to be a witness'
(iii) against himself.[77]

This Article extends to non-citizens also.[78]

Article 21 states that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

In Article 21 the word "law" has been used in the sense of state made or enacted law and not as an equivalent to the law in the abstract or general sense embodying the principles of natural justice. The expression "procedure established by law" means the procedure prescribed by the law of the State and it should not be construed in the light of the meaning given to the expression "due process of law" in the American Constitution.[79]

Article 22 provides for protection against arrest and detention in certain cases. Clauses (1) and (2) lay down the procedure which is to be followed when a person is arrested. They ensure four things: (a) right to be informed regarding grounds of arrest, (b) right to consult a legal practitioner of his choice, (c) right to be produced before a Magistrate within 24 hours, (d) freedom from detention beyond the said period except by order of the Magistrate. These requirements are mandatory and non-compliance gives rise to a right to be released by a writ of habeas corpus.[80]

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[76] Venkatraman v. Union of India, (1954) SCR 1150.

[77] Sharma v. Satish, (1954) SCR 1077.

[78] Anwar v. State of Jandk, AIR 1971 SC 337.

[79] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

Clause (3) of Article 22, however, provides for an exception to the above provision and states that Clauses (1) and (2) of Article 22 shall not apply to an enemy alien or to any person detained under any law providing for preventive detention.

Clauses (4) to (7) provide for nature of preventive detention and the Constitutional safeguards relating thereto. Clause 4 states that no law providing for preventive detention shall authorize the dentention of a person for a period exceeding three months unless (i) it has been approved by an advisory committee consisting of persons who are qualified to be High Court Judges, (ii) the Parliament prescribes by law under Clause (7) of Article 22.

However, the Constitutional safeguards against preventive detention and their efficacy was overturned during the state of emergency proclaimed in June, 1975.[81]

Clause 5 states that when a person is detained under any law providing for preventive detention, the authority making the order shall give the detainee the grounds of such detention, as soon as possible, while clause 6 states that it is not necessary to follow clause 5 if it is against public interest to disclose the facts which warranted the detention, and clause 7 states that Parliament may prescribe the period under which certain persons may be detained.

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[80] In re: Madhu Limaye, AIR 1969 SC 1014.

[81] Basu, D.D., Constitutional Law of India, (1978), p 76.

C. Suspension of Fundamental Rights during Emergency

Article 358 of the Constitution suspends Article 19 while the proclamation of emergency is in operation. It removes the fetters created on the legislative and executive powers by Article 19 and if the legislature makes laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of emergency or even thereafter.[82] The suspension of Article 19 is complete during the period in which the proclamation is in operation and on its revocation, even though the laws made during the emergency become open to attack on the ground of contravention of Article 19, any liability incurred or any executive action taken, under such laws during the period of emergency cannot be challenged on that ground.[83] Article 358 makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the proclamation is revoked.[84]

The Constitution (42nd Amendment) Act, 1976 has added a proviso to Article 358 whereby if the emergency is proclaimed only in respect of a part of the country, the suspension of Article 19 will be confined to that area only.

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82. Makhan Singh v. State of Punjab, AIR 1964 SC 381.

83. State of M.P. v. Bharat Singh, AIR 1967 SC 1170.

84. Amadavalasa Co-op Soc. v. Union of India, AIR 1976 SC 958.

While Article 358 automatically suspends Article 19 during the proclamation of emergency, Article 359(1) lays down that during the same period, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III of the constitution (the fundamental rights) as may be mentioned in the order and all proceedings pending in any court for the endorsement of such of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. Clause (2) provides that an order so made may extend to the whole or any part of India, and Clause (3) requires that every order so made shall be placed before each House of Parliament.

The Constitution (38th Amendment) Act, 1975, added clause (1A) with retrospective effect which clarifies as to what would happen after the ban in Article 359 was lifted, on the revocation of the proclamation made under Article 352. After the insertion of clause (1A) the following consequences would result from expiry of the order under Article 359(1):

(i) The infringement of any fundamental right by an Act or executive order during the emergency may be challenged in a court of law.[85]

(ii) But even though any statue or executive act may be declared unconstitutional in such a proceeding it would not invalidate any act done or omitted to be done while the order under Article 359 was in operation. No act of indemnity would, accordingly be necessary to legalize the illegal acts done during emergency or to immunize the authorities who have been responsible for them.[86]

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[85] Ibid., para 26.

The proviso to clause (2) added by Constitution (42nd Amendment) Act, 1976 permits the extension of an earlier order relating to a part of India to some other part on the condition that the President is satisfied that such extension is necessary in view of the nature of the activities being carried on by disruptive forces in the area in which the original order is operative, by which the security of some other part of India is threatened.

D. The Proclamations under Article 352(1)

There have been three occasions in the history of India when a state of emergency has been declared. The first proclamation declaring emergency was made on the 26th of October, 1962, when China invaded India. Simultaneously with the issue of the proclamation under Article 352(1), the President promulgated Defence of India Ordinance, 1962 which was later replaced by the Defence of India Act, 1962. The Act was to provide for "special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences". The Defence of India Rules (D.I.R.) framed under the ordinance were saved by the Act and continued to be in operation till six months after January 10, 1968, when the proclamation made under Article 352(1) was revoked. As a consequence of the proclamation of October, 1962, Article 19 was suspended and another order of the President made under Article 359 provided that persons arrested or imprisoned under the Defence of India Act would not be entitled to move any court for the enforcement of any of his fundamental rights under Article 14, 19 or 21.

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[86] Basu, Supra, n. 81, p 429.

During the period when the proclamation of emergency was in operation, the Supreme Court of India handed down many decisions[87] in which it explained the consequence of the Presidential order made under Article 359(1). It held that:[88]

> Article 359(1) and the Presidential order issued under it may constitute a moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that claimant's fundamental rights specified in the Presidential order have been contravened, and the second condition relates to the period during which this is to operate. The ban operates either for the period of the proclamation or for such shorter period as may be specified in the order.

However, the court held in another case[89] that though it cannot enquire into sufficiency of material on which an order (for detention) is made or the propriety or expediency of the order but it (the Court) is not precluded from investigating into compliance with the procedural safeguards imposed by the statue or into a plea that the order was malafide or was made for colleteral purpose. This position has, however, considerably changed after a Supreme Court decision[90] handed out in 1976 which has been discussed later.

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[87] See Mohan Chondhry v. Chief Commissioner, Tripura, AIR 1964 SC 173; Makhan Singh v. State of Punjab, AIR 1964 SC 381; Ghulam Surwar v. Union of India (1967) 2 SCR 271; Md. Yakub v. State of Jand K, AIR 1968 SC 765.

[88] Makhan Singh v. State of Punjab, AIR 1964 SC 381.

[89] S. Singh v. Delhi Administration, AIR 1966 SC 91.

[90] A.D.M. v. S.K. Shukla, AIR 1976 SC 1207.

The second state of national emergency under Article 352(1) was declared on December 3, 1971, at the beginning of Bangladesh War. This and the previous proclamation on account of the Sino-Indian border war were justified as there was an imminent danger to the sovereignity and integrity of the nation because of actual war. The utility of such a drastic provision which makes the functioning of the government almost unitary was unanimously acknowledged. However, when the President proclaimed a state of national emergency on June 26, 1975, on account of "internal disturbances" and which led to about nineteen months of authoritarian rule that serious doubts were raised about sanctity of such a measure.

The 1975 emergency was unprecedented in a legal sense because it was declared for the express purpose of coping with internal disturbances, and because it deprived Indians (and foreigners living in India) of judicial and civil rights in more thorough manner than ever before. In order to analyse the proclamation of the state of emergency and its consequences, it shall be proper to follow the political developments immediately before the proclamation and the events which led to it.

E. Events Leading to Emergency in 1975

The trigger for the 1975 emergency was the reaction to series of political setbacks suffered by Prime Minister Indira Gandhi since 1971 when India's military intervention brought about the liberation of Bangladesh and her personal popularity touched an all time high. (In the March 1972 Provincial elections her candidates captured two thirds majorities in many Indian State legislatures and her position as the unchallenged leader of the congress was unquestioned.)

However, by mid 1975 the high hopes of the euphoric days of the Bangladesh struggle had faded. In the intervening three years the country had faced two years of drought and one year of an inadequate monsoon; the sudden rise in the cost of oil imports in 1973 and the consequent national and international inflation had caused India's foreign exchange and balance of payments position to deteriorate to all time lows; domestic inflation was as high as 30 percent during part of this period and 20 percent during most of it. Confronted by problems that were not exclusively of their own makings, Mrs. Gandhi and her government were increasingly blamed for them, the more so because of the enormous expectations that had been raised by the slogans and rhetoric in which the Congress party had promised to eliminate poverty. Public disillusionment tended to focus primarily on the issue of poverty, which was on the increase and on corruption, seemingly more blatant and visible as economy spiraled downwards.[91]

Another important development during the same period was the return to public life of Mr. Jayaprakash Narayan (popularly known as JP) who was one of the few influential survivors from the pre-Independence nationalist struggle with a reputation for integrity. In March, 1974, Mr. Narayan after being in a political oblivion since 1947, spoke out publicly against the corruption in the high places

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91. Frenda Marcus F., India in an Emergency Part I, American Fieldstaff Reports 1975, p 6.

and accused Mrs. Gandhi of aspiring to a Soviet-backed dictatorship, warning the nation that it should prepare for resistance to "facist repression". When Mrs. Gandhi responded by raising questions about the monetary donations received by Mr. Narayan and accused him of being soft towards the American capitalist influence, Mr. Narayan decided to assume leadership of a student movement in Bihar. Prior to this, in early 1974, a similar agitation of students was brewing in the western state of Gujrat and which had a definite impact on the anti-Congress movement in Bihar started later that year. These movements quickly developed into national opposition campaign for 'total revolution';[92] and by early 1975 had won considerable popular support. In 1974 the first impact of the Gujrat movement was felt. The Congress government in the state which was the main target of the attack resigned and the state assembly was dissolved. The administration of the state was placed under President's Rule. Following a fast undertaking by Mr. Morarji Desai, then a leading figure of the opposition, the central government agreed to hold elections in the state in June, 1975. To fight this election, the opposition parties formed a Janta (Peoples") front and won an important victory by capturing eighty six seats as compared to seventy five by the Congress.[93] Besides, in a number of by-elections held during the same period many candidates sponsored by the combined opposition and backed

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92. A term coined by Mr. Naryan and which concentrated primarily on the issue of corruption.

93. The Congress Party which had won 50.9% popular vote in 1972 could win only 40.8% popular vote in 1975.

by Mr. Narayan won resounding victories thus indicating that the people were disenchanted with the performance of the Congress governments.

On June 12, 1975, when the results from Gujrat were due, the Allahabad High Court found Mrs. Indira Gandhi guilty of violating the Representations of People Act in her 1971 election to Parliament and her election was set aside.[94] She was also disqualified from contesting any public election as provided for in Sec 8A of the said Act. The High Court verdict and the Gujrat election results were the two events that promised ominous changes in India's political life. Though the order of the High Court was 'stayed' by the Supreme Court but the 'stay' granted by the highest Court of the land was conditional by which she was not permitted to vote in Parliament while the Case was under review, an anamolous position for a Prime Minister.

This conditional stay created severe dilemmas for Mrs. Gandhi and the Congress party. With the annual 'monsoon session' scheduled for the middle of July, Congress now faced the prospect of going into a parliamentary session with a Prime Minister who was unable to vote as member of Parliament, and with the cloud of judicially verified corruption hanging over the head of its leader. Many Congress leaders thought that the Prime Minister's embarrassing position might be just the fillip needed to set off an uncontrollable surge of support to the opposition, both within Parliament and outside. With image of the party already severely damaged by the election results in Gujrat and the national elections due in March, 1976, this possibility seemed ominous. Perhaps even more important in moving Mrs. Gandhi toward a declaration of emergency however, was the feeling among her supporters that the conditional stay granted by the Supreme Court would result in mass desertions by Congressmen from the camp of the beleaguered Prime Minister.[95]

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[94] Mrs. Indira Gandhi's election to the Parliament was set aside by the Allahabad High Court on two grounds: Firstly, she had received assistance in her 1971 campaign from an officer who remained a gazetted officer of the government for a period of 18 days after he started election work for her. Secondly, she was found to have received assistance from army and police, in erecting election rostrum.

Fears on both these counts were partially substantiated within 24 hours of the granting of stay by the Supreme Court on June 24. Following afternoon opposition parties led by Mr. Jayprakash Narayan held a massive rally to press for the resignation of Mrs. Gandhi. Earlier they had agreed to launch a nationwide Gandhian civil disobedience struggle designed to force the Prime Minister from office. In a manner reminiscent of the struggle for independence, Mr. Narayan asked the people of India to "be prepared to Court arrest, to go to jail for the strong democracy, for the sake of freedom". At the same rally he had made another statement which he had made on a number of occasions in the previous years and which had come under severe criticism from the ruling party. Mr. Narayan said that: "government servants should not obey any unjust orders; the military's responsibility is to protect Indian democracy; their duty is to protect the Constitution . . . the police are trained to act in a blind way; they should also think--the police, don't they have self-respect; are they just there for the sake of bread?"

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[95] Frenda, Supra, n. 91, p 11. See also Kuldeep Nayar, The Judgement (1977) and S.D. Singh, Emergency Fact and Fiction (1978).

Confronted now with the threat of being ignominiously ousted from office and threatened at the same time with a prospect of crippling nationwide protest movement, Mrs. Gandhi decided to proceed the next morning with the imposition of the state of emergency in the country.[96]

F. Emergency and After

In the night of June 25 and June 26, the government used the authority of the Maintenance of Internal Security Act (M.I.S.A.) which was enacted for the Bangladesh war to arrest about a hundred or more political leaders who were opposed to Mrs. Gandhi and her party. The arrests included prominent figures from the right wing parties, from her own party, and from certain left parties. Besides thousands of party workers belonging to various non-communist political parties were also rounded up.

Simultaneous with the arrests, the President, on the advice of the Prime Minister proclaimed a state of emergency on account of "internal disturbances". This was followed by a broadcast to the nation by the Prime Minister in which she stated "The President has proclaimed emergency. There is nothing to panic about." She went on to explain the reasons for such a declaration and said "All manner of false allegations have been hurled at me. The Indian people have known me since my childhood .... This is not a personal matter. It is not important whether I remain Prime Minister or not. However, the institution of the Prime Minister is important .... Now we learn of programs challenging law and order throughout the country. With a view to disrupt normal functioning. How can any government worth the name stand by and allow the country's stability to be imperiled?"[97] Thus the country was put under emergency rule on account of "internal disturbances" for the first time in the history of free India.

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[96] Ibid., p 13.

Following the proclamation dated 25th June, declaring a state of national emergency, the President acting under the powers conferred by Article 359 suspended the enforcement of Articles 14, 21 and 22 on the 27th of June, 1975, and Article 19 which automatically stands suspended, was specifically included in another order made under

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[97] Quoted in Palmer, Norman D: India in 1975 - Democracy in Eclipse, Asian Survey Vol. XVI, Part I, p 100. However, Shah Commission of Inquiry, appointed by the Government of India under Section 3 of Inquiry Act, 1952 to investigate "emergency excesses" and headed by the former Chief Justice of India, in its report published on March 11, 1978, indicates that the situation prior to the proclamation on June 25, 1975, was "normal" on every front. Some of the excerpts taken from paragraph 5.60 of the report which completely contradict Mrs. Gandhi's assertion that proclamation of emergency was imperative to deal with the situation are reproduced below:

"(a) on the economic front there was nothing alarming. On the contrary, the whole-scale price index had declined by 7.4 percent between December 3, 1974, and the last week of March as per Economic Survey 1975-76, a Government of India Publication.

(b) on the law and order front, the fortnightly reports sent by the Governors of various states to the President of India and by the Chief Secretaries of the States to the Union Home Secretary indicated that the law and order situation was under complete control all over the country.

(c) the Home Ministry had received no reports from the State governments indicating any significant deterioration in the law and order situation in the period immediately preceeding the proclamation of emergency.

(d) the Intelligence Bureau had not submitted any report to the Home Ministry any time between 12th of June and 25th of June, 1975, suggesting that the internal situation in the Country warranted the imposition of internal emergency."

Special courts, created under Special Courts Act, are now trying Mrs. Gandhi on the basis of the Commission's Report. The vires of the Special Courts Bill was challenged and the Supreme Court decided that it is *intra-vires* of the Constitution and does not violate provisions of Article 14. (See AIR 1979 SC 478.)

Article 359. With the proclamation of a national emergency and the subsequent orders of the President made under Article 359, Indian democracy entered into a state of eclipse.[98] The events that followed confirmed some worst fears of those who felt that India had permanently joined the vast majority of those states of the developing world where erosion of democracy has set in much earlier. Three aspects of emergency were particularly conspicuous and brought a virtual end to the democratic way of life in the largest democracy of the world. They were (1) the widespread arrests and detention of thousands of persons without legal remedies, (2) the rigid censorship of the press, (3) the constitutional and legal aspects, especially the retroactive amendments to the constitution which almost changed its fundamental structure.

(i) Arrest and Detention Without Trial: About more than one hundred and fifty thousand people were arrested and detained without trial. This was made possible by various amendments to the Constitution and to the various preventive detention acts.

Indian Constitution gives a constitutional status to preventive detention and provides safeguards against its misuse: Art. 22 Cls. (3) to (7). However, their efficacy was overturned by changes which took place during the emergency declared in 1975 and the detenues had no locas standi to move the court for any relief. These changes which greatly affected the 'personal liberty' of the citizens are summarized below:

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[98] For a detailed analysis of the Emergency and its implications see Richard L. Park, Political Crises in India, Asian Survey Vol. XV (1976); W.H. Morris-Jones, Whose Emergency - India's or Indira's?, The World Today, Vol. XXXI (Nov. 1975) and Kuldeep Nayar - The Judgement (1977).

(a) After the lapse of the Preventive Detention Act of 1950 in 1969, the central law of Preventive Detention came to be embodied in two new Acts: (i) the Maintenance of Internal Security Act, 1971 (M.I.S.A.), and (ii) the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (C.O.F.E.P.O.S.A.), both of which were permanent enactments.

By the Constitution (39th Amendment Act), 1975 both these Acts were placed in the 9th schedule (items 92, 104), which read with Article 31-B means that these Acts were made totally immune from any challenge on the ground of contravention of any of the fundamental rights.

(b) These Acts which in themselves provided for safeguards were amended during the emergency with the result that if the government or the competent officer considered it to be against public interest to disclose the facts relating to the detention of a person or to give him an opportunity of making a representation against the order of detention, such non-disclosure or denial of representation would be legitimate.

(c) Prior to April, 1976, the Supreme Court had held in a number of cases[99] (which were followed by the High Courts)[100] that there is no bar to challenge an order of detention on the ground of contravention of a fundamental right other than those specified in the Presidential order; or on any other ground, e.g., malafides or ultra vires of some statutory provisions.

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[99] Makhan Singh v. State of Punjab, AIR 1964 SC 381; Mohan Chowdhary v. Chief Commissioner, Tripura, AIR 1964 SC 173; Ram Manohar v. State of Bihar, AIR 1966 SC 657; Meenakshi Mills v. Union of India, AIR 1974 SC 366.

[100] Bhanudas v. Pranjpe (1976) Cr. L.J. 534 (Bombay)

However, a decisive blow was delt to the above position by the Supreme Court in the majority decision in A.D.M. v. Shukla[101] handed out in April, 1976. The Court held, in a proceeding for writ of *habeas corpus,* that after the adoption of the Constitution, the sole repository of the right to life and personal liberty was contained in Article 21, so that when Article 21 remains suspended during the emergency, any order of imprisonment or detention could not be challenged on the ground that it was without any authority of law or in excess of it, or that it was against the common law principle of Rule of Law. It followed that while Article 21 is suspended by a Presidential order, under Article 359, an individual who has been arrested or detained "loses his locus standi to regain his liberty on any ground".[102]

Using the cover of the aforesaid legal and judicial sanctions, the government made indiscriminate arrests thus jeopardizing the very concept of civil liberty enshrined in the Constitution. Further, using the power under the Defence of India Rule (D.I.R.), the government banned 26 political organizations and arrested its top leaders and majority of its members. Even if a person was remotely connected with one of the banned organizations, he was not spared.

(ii) Censorship: With the imposition of strict censorship immediately following the proclamation of emergency, the nation's press was effectively silenced except for the versions of the events that the authorities wanted the people at home and abroad to hear. Newspaper and other media sedulously avoided controversial issues and criticism of governmental policies. Occasional deviators were warned and punished in various ways. Foreign correspondents were also subjected to the censorship, and a few were ordered to leave the country. On July 6, 1975, the government issued "Guidelines for the Press" which were perhaps most restrictive in a democratic state. Some of these censorship regulations were given the force of law when the Parliament enacted "The Prevention of Publication of Objectionable Matters Act", 1975 which empowered the government to ban the publication of news about "any activity prejudicial to the sovereignty and integrity of India and the security of the State". When the journalists raised a voice of protest, they were promptly arrested.[103] This censorship continued till January, 1977, when Mrs. Gandhi in a dramatic move dissolved the Parliament and called the general elections.

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[101] AIR 1976 SC 1207.

[102] Basu, Supra, n. 81, pp 74-75, 78-79 and 428-429.

(iii) The Constitutional and Legal Aspect In 1972, A.H. Hanson and Janet Douglous, the British political scientists, wrote of "the ominous tendency of Mrs. Gandhi's government to treat the Constitution as something that can be, and ought to be, manipulated for party - political advantage, rather than a set of rules which all must obey".[104] This is exactly what happened during the emergency when Mrs. Gandhi and her party which commanded absolute majority in both the houses of Parliament and more than 12 States[105] was able to bring sweeping changes in the Constitution and other laws of the land, thus creating a system which definitely favoured her and her party but not necessarily the country. This is evident from a series of changes which have been discussed below.

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[103] See Norman D. Palmer, Supra, n. 97, p 102 and Ved Mehta, The New India (1978) pp 62-68.

[104] Hanson, A.H. and Douglas J., India's Democracy, (1972), p 49.

[105] As required by the Constitution (Article 368) for amendment of its certain provisions.

The first of such acts brought forward in the monsoon session of the Parliament, immediately after the proclamation of emergency, was a vote in the Lok Sabha (the lower house) to suspend its rules of procedure in such a way that only government motions were allowed and the question hour was discontinued. Operating under the new rules, the Lok Sabha by a vote of 336 - 59, approved the President's proclamation of June 26. Protesting against what one opposition member called "Parliamentary democracy smothered", the non-communist opposition staged a walk-out from the session refusing to re-enter it thereafter.[106]

Mrs. Gandhi's Law Minister then proceeded to propose a Constitutional amendment (38th) barring law courts from hearing petitions challenging either the proclamation of any emergency, or any rules imposed under an emergency proclamation. The 38th amendment also explicitly granted to the President the right to proclaim any number of emergencies simultaneously.

Early in August an amendment in the Representation of the People Act was drafted which was clearly intended to exonerate Mrs. Gandhi of the Allahabad High Court ruling in her election case.

To insure that this amendment to the electoral law would apply in Mrs. Gandhi's case, it was made retroactive. Moreover, the amendment contained provisions that legalized, again retroactively, the two offences of which Mrs. Gandhi had been found guilty. According to these latter provisions, it was legal (with retroactive effect) for officials to work for candidates as part of their official duties, and courts were required to accept as fact the statements of government officials in trials involving charges of electoral mal-practices.

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[106] Frenda, Supra, n. 91, p 17.

Further, during the same session of Parliament, a second constitutional amendment (the 39th) was designed to make it impossible for the courts to even consider matters connected with the election to the office of the Prime Minister, President, Vice-President, and Speaker of the Lok Sabha. This amendment also excluded 38 Central and State laws--including M.I.S.A. and the 1975 amendment to the Representation of People Act from judicial litigation.[107] It is obvious that the aforesaid constitutional changes had nothing to do with the welfare of the country but were designed only to save the Prime Minister from an adverse judicial verdict in her case which was pending in the Supreme Court. The Supreme Court did exonerate her of the charges later that year.

The 42nd Amendment:

Perhaps no other amendment to the Constitution of India had effected such drastic and widespread changes in the nature and form of the Constitution as did the 59 clause Constitution (42nd Amendment) Act, 1976.[108]

Among the major changes brought into the Constitution by the 42nd Amendment were the insertion of the words 'Socialist' and 'Secular' in the preamble, devaluation of fundamental rights vis-a-vis the Directive Principles of State Policy, extending the tenure of Lok Sabha to six years and its attempt to undermine the position of judiciary and establish absolute supremacy of the Parliament, thus destroying the concept of limited government, an inherent feature of the Indian Constitution. However, most of these far reaching distortions were corrected by the new government which assumed power after the defeat of Mrs. Gandhi and her party in the historic 1977 general elections. Keeping the above changes in mind, it can be safely said that the apprehension of the British political scientists that more likely than a military coup or secessionist movement in India is "transformation of political practice, within the formal framework of the Constitution itself, so radical as to subvert the conventions and customs that have hitherto been accepted and operated"[109] was not incorrect.

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[107] By putting them in Ninth Schedule which is immune from judicial review by virtue of Article 31-B.

[108] It came into force on Jan. 8, 1977.

The Other Aspects:

Mrs. Gandhi's rule during the emergency did meet with some resistance and an underground opposition to the government developed during the emergency, but it hardly constituted a threat. There appeared to be a thriving underground press, but many of its members were arrested. In mid 1976 George Fernandes,[110] the most prominent leader of the underground and head of the railway federation was picked up and charged with conspiring to overthrow the government by violent means. Strikes were effectively prevented and while in mid 1976 there were some vocal protests in New Delhi and other parts of north India over the slum clearance and sterilization programs launched

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109. Hanson and Douglas, Supra, n. 104 p 49.

110. Later on he became a Cabinet Minister.

by the government, there were no signs of any mass opposition. Later that year the regime seemed to soften its stand as fewer arrests were made and a number of opposition leaders were released.

However, by now the proclamation of emergency was being justified as a means of ensuring the country's economic growth, alleviating poverty, ensuring social justice and so on--in short, as an instrument for dealing with many of the country's fundamental long-term problems instead as a temporary measure to deal with a threat to internal security--a reason for which it was apparently imposed.

Another noticeable development during 1976 was the emergence of Mr. Sanjay Gandhi, son of the then Prime Minister who, as revealed later,[111] weilded considerable influence on the Congress party and the government thus creating an extra constitutional center of power. At the end of 1976 the Prime Minister declared still another one year postponement of elections and by early 1977 there seemed little prospect that Indea would have free elections any time soon or that the democratic process would be restored by peaceful and constitutional means.[112]

III. THE PARLIAMENTARY ELECTIONS AND THE DEFEAT OF THE CONGRESS

The defeat of Mrs. Gandhi and the Congress party in the 1977 Parliamentary elections clearly demonstrates that the proclamation of the emergency and the performance of the government were not vindicated by the people. When in a dramatic move on January 18, 1977, Mrs. Gandhi decided to hold the elections in March, it was widely believed[113] that she was holding the elections for two reasons: firstly, the elections would legitimize the emergency and the recent moves of the government to institutionalize many of its features, including the sweeping changes in the Constitutional law and secondly the elections would provide Mrs. Gandhi's younger son, Mr. Sanjay Gandhi, with an opportunity to establish his power within the Congress party in Parliament and thereby improve his prospects for succession to the Prime Ministership. However, this was not to be. The opposition parties, the leaders of which were still in jail or were being gradually released, hurriedly combined to form a Janta (Peoples') party and decided to contest the majority of seats.

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[111] See Shah Commission Reports (Part 1 and 2).

[112] Weiner, Myron, India at the Polls, (1978), p 7.

Further, the Janta party got a shot in the arm when Mr. Jagjiwan Ram, a senior minister resigned from the government, denounced the emergency and formed his own political party which entered into an electoral alliance with the Janta. The Janta party campaigned on the single issue: ending the emergency and restoring democracy to India. This was supplemented by the hitherto unpublicized (because of strict press censorship and the authoritarian rule) "excesses" committed by the government during the emergency, which included the sterilization and slum clearing programmes of the government.[114]

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[113] See Myron Weiner, The 1977 Parliamentary Elections in India, Asian Survey, Vol. XVII, p 619.

[114] See Shah Commission Report (Part 2), Chapter XIII and XIV, also see Lee, I. Schlesinger, Emergency in Indian Village, Asian Survey, Vol. XVII, p 627 and Time, April 4, 1977, The Issue that Inflamed India.

All these factors combined to overthrow the Congress, for the first time since independence and Mrs. Gandhi, after eleven years, from power. The election results which started coming in on the 20th of March, 1977, firmly established the Janta supremacy over the Congress. The ruling party was able to win only 28.2 percent of seats in the house and 34.5 percent of popular votes. The 1977 election was clearly indicative of the fact that the Indians despite economic and other social problems, are committed to democratic way of life and value individual rights and freedom more than anything else. Commenting on the outcome of the elections, Myron Weiner, Ford Professor of Political Science at the M.I.T. and a noted authority on the subcontinent has stated in his book:[115]

> Problems will abound, as they do in any country as complex, diversified, and poor as India, but they will be tackled once again in an open political arena. Whatever the future brings it is clear that India has made a remarkable reaffirmation of its commitment to democracy. The collapse of the authoritarian government of Indira Gandhi reversed the notion that democracy alone is fragile.

A. After the Elections

Mrs. Indira Gandhi, in her final act before resigning from the government advised the President to revoke the proclamation of emergency issued on June 25, 1975, on the ground of "internal disturbance".

The new government which assumed power on the 24th March, 1977, revoked on the 27th of March, the state of emergency proclaimed on the ground of "external aggression" on the 3rd of December, 1971, during the war with Pakistan. As a result of the revocation of both the emergencies, Articles 14, 19, 21 and 22 which were suspended by Presidential orders made under Article 359 came back into effect thus permitting a litigant to challenge the constitutionality of a law or order on the ground of transgression of any of these fundamental rights.

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[115] Weiner, Supra, n. 112, p 111.

In course of time, the new government, which was committed to restore democracy, repealed the M.I.S.A. and the Prevention and Publication of Objectionable Matters Act, 1976. It also amended the Constitution to cure certain obnoxious changes introduced by the former government during the emergency, prominent among them were the restoration of the five year term of the Lok Sabha and the State assemblies, the repeal of Article 31 D, which had given absolute power to the government to deal with "anti-national" activities and associations without any restraint, restoring the power of the Supreme Court and the High Courts to determine the Constitutionality of the State and Central law respectively and bringing the election of Prime Minister and Speaker back within the purview of normal election law proceedings.

Perhaps the most significant change in the context of this thesis was brought into effect by the Constitution (44th Amendment) Act, 1978, which replaced the words "armed rebellion", thus ensuring that no future government would be able to proclaim the state of emergency and misuse the power unless there is an apprehension of "armed rebellion"--a phrase which is more limited in scope than the "internal disturbance". It should be born in mind that the opposition movement prior to the proclamation of emergency in June, 1975, was only directed against the Congress misrule and was pressing for Mrs. Gandhi's resignation in view of the High Court verdict, two events which were perfectly normal in a democratic country. But Mrs. Gandhi and her government considered them as precursor to "internal disturbances" and imposed a state of national emergency which virtually brought an end to the democracy in the country.

The other important changes introduced by the Constitution (44th Amendment) Act, 1978, which should help in avoiding the abuse of the emergency provisions are:

(i) elaborate parliamentary control over the proclamation declaring a state of emergency (clause 4 to 8 of Article 352)

(ii) consent of the Cabinet in writing mandatory for the President to issue the proclamation (clause 3 of Article 352)

(ii) suspension of Article 19 only permissible if the emergency declared is due to war or external aggression or threat thereof. Moreover, a recital to the effect that such law which contravenes Article 19 during an emergency is in relation to the proclamation. In other words, Article 19 would only stand suspended for those laws or executive action which are necessary to counter the emergency situations (Article 358)

(iv) under the amended constitution, the President under Article 359 can not suspend the right to move the court for the enforcement of Articles 20 and 21 (protection in respect of conviction for offences and protection of life and personal liberty) while suspending the enforcement of any other right.

IV. OTHER KINDS OF EMERGENCIES

Besides "war" and "armed rebellion", the Indian Constitution contemplates two other kinds of emergencies:

A. Failure of Constitutional Machinery in a State

Article 355 of the Indian Constitution states that it is the duty of the Union to ensure that the government of every state is carried on in accordance with the provisions of the Constitution.

Article 356, accordingly, provides that if the President is on receipt of a report from the Governor of a state or otherwise is satisfied that a situation has arisen in which the government of a state cannot be carried on in accordance with the provisions of the Constitution the President may by proclamation (a) assume all or any of the functions of the government of the State, or all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the legislature of the State, (b) declare that the powers of the legislature of the State shall be exercisable by the authority of Parliament and (c) make such incidental and consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of the proclamation including the provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to anybody or authority in the State. The President cannot however assume to himself any of the powers vested in or exercisable by a High Court or suspend in whole or in part the operation of the Constitution relating to the High Courts. A proclamation under ARticle 356 can be revoked by a subsequent proclamation and every proclamation, other than a proclamation revoking a previous one, must be laid before each House of Parliament and ceases to operate at the end of two months, unless before that time it has been approved by resolutions of both HOuses of Parliament, provided that if the proclamation is issued when the House of the People is dissolved, and a resolution approving the proclamation has been passed by the Council of States, the proclamation ceases to have effect if within thirty days from the date on which the House of the People first sits after its reconstitution it is not approved by a resolution of the House. Unless revoked, a proclamation so approved ceases to operate on the expiration of six months from the date of the passing of the second of the resolutions approving the proclamation. But the proclamation can be renewed by resolutions of the House passed in the manner required for passing the original resolutions.

Article 356 does not put any limitation on the materials from which the President can be satisfied about a failure of Constitutional machinery in the States. His satisfaction can be derived from a report from the Governor of a State or otherwise and cannot be questioned in any court of law on any ground. This power has been exercised on a number of occasions.[116] As the President has to be satisfied that there is a failure of Constitutional machinery, and as the question of such failure is a question of fact, it is not possible to describe in advance the circumstances under which it can be said that "the Government of a State cannot be carried on in accordance with the provisions of this Constitution". Article 357 comes into play if under Article 356(1)(b) the President has declared that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament.

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[116] Proclamations have been issued with reference to: Punjab in 1951, P.E.P.S.U. in 1953, A.P. in 1954, Travancore-Cochin in 1956, Kerala in 1959, Orissa in 1961, Kerala in 1964 and 1965, Punjab in 1965, Haryana in 1967, West Bengal and U.P. in 1970, Orissa, Punjah, Gujrat and West Bengal in 1971, Bihar in 1972, Orissa, A.P., Manipur and U.P. in 1973, Gujrat in 1974, Tamil Nadu and Gujrat in 1976, Goa (Union-territory) in 1979. For detailed discussion see Shukla, Supra, n. 23, pp 561-565.

In that case, Article 357 provides that Parliament may confer on the President the power of the legislature of the State to make laws.

The expression "Government cannot be carried on in accordance with the provisions of the constitution" means the failure of a State government to work according to the Constitution, in circumstances which have no necessary connection with external aggression, internal disturbance or armed rebellion, though these may be the cause of the failure in particular cases. In the past this Article has been generally applied in a situation when no political party or coalition thereof has been able to form a stable government in the State.

However, in an unprecedented step, the President acting under Article 356(1) dissolved the 9 State assemblies where the ruling Congress party had faired badly in the 1977 Parliamentary elections. The authority and validity of the President's order was challenged by a number of State Governments but the Supreme Court held in State of Rajasthan v. Union of India[117] that President's satisfaction under Article 356(1) could not be questioned in any court on any ground.

B. Financial Emergency

Article 360 is the last provision directly dealing with an emergency under the Indian Constitution. It provides that if the President is satisfied that a situation has arisen by which the financial stability or credit of the whole or part of India is threatened, he may by proclamation make a declaration to that effect. The provisions contained in Article 352(2) as regards the revocation of a proclamation issued under cl. (1) thereof as also the provisions for laying the proclamation before the Houses and the period during which the proclamation is to operate unless supported by resolutions of the two Houses are made applicable to a proclamation under Article 360. The issue of such a proclamation does not directly affect the legislative relations between the Union and the States but it would be proper to mention the effect of such a proclamation. During the period that such a proclamation is in operation, the executive authority of the Union extends to giving of directions to any State to observe such cannons of financial propriety as may be specified in the directions and to the giving of such other directions as the President may deem necessary and adequate for the purpose. Article 360(4) provides that "Notwithstanding anything in this Constitution--

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[117] AIR 1977, SC 1361

(a) any such direction may include--

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of Article 207 apply to be reserved for the consideration of the President after they are passed by the legislature of the State;

(b) it shall be competent for the President during the period any proclamation issued under this Article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts."

The language of the opening words of sub-cl. (a) "any such direction may include" show that the directions are not limited to the two items there mentioned. Article 360(b) relates not to the State but to the Union, for, a financial emergency in one or more States may have the effect of precipitating and creating an emergency in the Union and express power is conferred to reduce the salary and allowances of all or any of the persons serving in connection with the affairs of the Union, including the Judges of the Supreme Court and the High Court. But the scope of Article 360 is a limited one, namely to effect drastic cuts in expenditure for enforcing economy and achiving financial stability. It does not mean that steps having a financial impact or incidence, such as the prevention of smuggling activities cannot be taken during the subsistence of a proclamation under Article 352, without making another proclamation under Article 360.

V. ARE THE EMERGENCY PROVISIONS AT ALL NECESSARY

As discussed, under the Indian Constitution, the power to proclaim an emergency is not limited to war or external aggression but extends also to internal disturbance (substituted by "armed rebellion"). The two kinds of emergencies involve totally different considerations and require separate treatment. Though the provisions were claimed as unique in the world and were justified on various other considerations,[118] the question of emergency powers has come to the fore because the recent emergency has made the Indians realise that how such powers are not only capable of being used to destroy the democratic structure of the Constitution, but were in fact so used. It has raised serious doubts about the sanctity and utility of such an extreme measure and the issue which calls for serious consideration is: Are the emergency provisions at all necessary?[119]

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[118] See pp 13-14 infra.

The paramount consideration of the members of the Constituent Assembly for the inclusion of emergency provisions in the Indian Constitution was that they thought it desirable that in extreme contingencies like war the federal government should have an overriding power to meet the situation and the Constitution can during such time, work as though it was Unitary. Such a rationale though correct in form is not correct in substance for the framers of the Constitution failed to notice that the federal Constitutions of the United States, Australia and Canada functioned in fact as unitary governments in times of war without having any explicit emergency provisions in their Constitutions. These Constitutions confer the defence or war power on the federal government; and since modern war "touches practically every aspect of national life", the war power enabled the federal governments of these three countries to do every thing necessary for the effective prosecution of the war. The Indian Constitution also vests in the Parliament the totality of the war or defence power as shown by the undernoted enteries in List I (Union List: Article 246),[120] Prima Facie, it would be reasonable to conclude that if the United States, Australia and Canada, which went through two World Wars, can get on well without enacting emergency powers in their Constitutions, so can India.

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[119] See Seervai, H.M., The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism, (1978), pp 84-118.

[120] Entry 1: Defence of India and every part thereof including preparation of defence and all such acts as may be condusive in times of war to its prosecution and after its termination to effective demobilization; Entry 2: Navel, military and air forces; any other armed forces of the Union; Entry 4: Naval, military and air force works; Entry 5: Arms, firearms, ammunition and explosives, Entry 15: War and Peace.

However, the Indian Constitution would require an emergency provision of a very limited kind. Unlike the Constitutions of the United States, Canada and Australia, the distribution of legislative power in India is with reference to three Lists--the Union, the State and the Concurrent. This would raise the gravest doubt whether Parliament's war, or defence power would enable Parliament to make laws in respect of matters in the State list and whether the Union of India can take corresponding executive action. During a war, Parliament must have power to make such laws and to take such action. Therefore, the Indian Constitution must provide that on a proclamation of emergency arising from war or external aggression or imminent threat of war or external aggression, Parliament shall have power to make laws in respect of matters referred to in the State List and the Union of India should have power to take corresponding executive action. The Union of India must also have power to take executive action as to matters in the Concurrent List since the proviso to Article 73(1)(a) states that in respect of matters in the Concurrent List, the executive power of the Union does not extend to the State unless Parliament by law expressly provides to the contrary. The only safeguards necessary for the limited emergency powers suggested above are that the President shall not issue a proclamation of emergency except on the written advice of the Council of Ministers, that such a proclamation must be approved by both Houses of Parliament, that it must stand revoked unless approved by both Houses before the expiry of 6 months from the date when it was previously approved unless it had been revoked earlier and it shall cease to operate on the expiry of three months from the termination of the war or external aggression.[121]

An obvious corollory to the changes suggested above is the deletion of Articles 358 and 359 from the Constitution which, while a proclamation of emergency is in operation, permits the suspension of any or all of the fundamental rights because as seen during the last emergency any person who criticised the policies and programmes of the government was silenced by the censor in the first instance and by preventive detention without access to the Court in the last. Such an attitude, it is submitted, would be disastrous in times of war. For not only is free discussion and debate necessary for effective direction of the war but is also necessary for maintaining civilian morale. High handed executive action, neglect or apathy can undermine civilian morale; and it is the function of the free press, and a free public and Parliamentary debate, to bring such action, neglect and apathy to light and to take steps to prevent its recurrence. It is widely believed that had there been freedom of press during the last emergency, many of the "excesses" would have been prevented by the government. If at all any restriction has to be placed on any of the civil liberties during a national emergency, such restriction would be considered reasonable by the Courts considering its necessity. Thus, it is suggested that in order to strengthen the values of free democratic society of which the Indian Constitution is both guardian and symbol, it shall be proper that emergency provisions contained in Articles 352, 358 and 359 be deleted.

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[121] Seervai, Supra, n. 119, p 99.

The substitution of "armed rebellion" as a ground for declaring emergency for "internal disturbances" in Article 352 is again open to two objections. First, there is enough power in the Union of India to put down armed rebellion by force, if necessary, by promulgating martial law, for every State and every citizen of State is entitled to repeal force by force. Secondly, armed rebellion is an imprecise concept and would lead to grave abuse, for though the rebellion by a hundred thousand or a million people who are armed can be seen to be an armed rebellion, the use of force by groups of people who are armed may or may not justify being called an armed rebellion. In short, government has sufficient force at its disposal to put down an armed rebellion and thus there is no need for the government to declare a state of national emergency to deal with such a problem.[122]

Besides the changes suggested above, two other provisions of the Indian Constitution which require a serious rethinking and scrutiny are (i) Authority under Article 22 to make preventive detention laws even in the times of peace and (ii) Power of President under Article 356 to proclaim President's rule in state. The implications and effect of these provisions have been discussed earlier and in the light of recent development it is thought desirable by the author that a committee of eminent jurists and parliamentarians should study their utility and consequences. It is suggested that they should either be deleted or adequately amended so that they cannot be misused, although some of such changes have already been brought into the Constitution by the Constitution (44th Amendment) Act, 1978.

CHAPTER TWO

I. EMERGENCY PROVISIONS UNDER THE CANADIAN SYSTEM

A. The Authority

Unlike the Indian Constitution which explicitly confers on the federal government an overriding power to deal with emergency situations, the basis of federal emergency power in Canada rests on the opening words of Section 91 of the British North America Act[1] which provide that:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order and good Government of Canada...

Accordingly, the validity of federal emergency legislation has always turned on the question whether the legislation was a valid exercise of federal emergency for the peace, order or good government of Canada or whether it unnecessarily invaded a field reserved to the provinces under Section 92 of the B.N.A. Act.

Further support for federal emergency legislation can be found in Section 15 of the B.N.A. Act which provides:

> The command-in-chief of the land and naval militia, and of all naval and military forces in Canada, is hereby declared to continue and be vested in the Queen.

Similarly, by Section 91(7) of the B.N.A. Act, Parliament is given legislative power with respect to "Militia, Military and Naval Service and Defence". However, Section 91(7) only provides supplementary power in aid of some other head of power giving legislative authority to Parliament.[2]

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[1] 30 and 31 Victoria, Ch. 3. Hereinafter referred as B.N.A. Act.

[2] Tarnopolsky, W.S. The Canadian Bill of Rights, (1975), p 332.

B. Nature of Power under Peace, Order and Good Government Clause

As indicated above, the federal emergency power derives its authority primarily from the peace, order and good government clause and this has never been seriously challenged. But the relationship between the peace, order and good government clause and the enumerated heads of federal and provincial legislative power has generated a legal controversy which, even today, is far from settled. Accordingly, it is considered necessary to briefly outline this continuing controversy which has a definite impact on the understanding of the subject.

Broadly, there have been two interpretations of the nature of relationship between the peace, order and good government clause and the enumerated heads of federal and provincial legislative power contained in Sections 91 and 92 of the B.N.A. Act. According to one view the peace, order and good government power is "general power" and does not comprise of what is left after subtraction of the federal as well as the provincial enumerated heads; on the contrary, the peace, order and good government is entire federal power which has not been allocated to the provincial legislatures. The thirty-two enumerated heads of federal power in Section 91 are merely an illustrative specification of subjects as examplifying "for greater certainty but not so as to restrict the generality" of the scope of the "exclusive legislative authority of the Parliament" under the opening words of the section to make laws for peace, order and good government of Canada.[3] The O'Connor Report (1939)[4] supports this thesis and so does the final report of the

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3. Abel, A.S., What Peace, Order and Good Government, (1968) 7 West Ont. Law Review, p 4.

4. Report of the Parliamentary Counsel relating to the British North America Act, 1867 (Senate of Canada, 1939, Annex I).

special joint committee of the Senate and the House of Commons on the Constitution of Canada (1972) which has made the following recommendations:[5]

> 52 - The "Peace, Order and Good Government" power should be retained in the Constitution as an expression of the overriding federal legislative power over matters of national nature.
>
> 53 - Since the Federal General Legislative Power is counterbalanced by a provincial power over matters of a provincial or local nature, there is no place for a purely residuary power.

The other view which has been advanced is that the peace, order and good government power is residuary in its relationship with the enumerated heads of power. According to this viewpoint it comprises of what is left after subtraction of the federal as well as the provincial legislative powers. Supporters of this theory emphatically assert that "the "general" theory of the peace, order and good government power, as including the whole of federal power is not a particularly helpful way of reading the B.N.A. Act".[6] They substantiate their argument by stating[7]

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[5] Reproduced by Laskin, Canadian Constitutional Law, (1975), p 193.

[6] Hogg, P.W., Constitutional Law of Canada, (1977), p 243.

[7] Ibid. Supporting the same line of argument W.H. Lederman has stated "the implication is plain that this double listing was done because the Fathers of Confederation, the Colonial Secretary and the Parliamentary draftsmen were all satisfied that it was necessary; that rather long and particular Federal list, supported by the "notwithstanding" clause and the "deeming" clause, was essential if items like banking, marriage and divorce, copyright, connecting railways, and so on were to be within the powers of the new Federal Parliament where they wanted them to be....the Federal list was not just superflous grammatical prudence." (Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation, (1975) 53 Can. Bar. Rev., pp 602-603.)

> ...despite the apparent import of the reference in 5.91 to 'for greater certainty, etc.', it is reasonably clear that many of the enumerated heads of federal power are not merely examples of the opening words. Topics such as 'trade and commerce' (S. 91(2)), 'banking' (S. 91(15)), 'bills of exchange and promissory notes' (S. 91(18)), 'interest' (S. 91(19)), 'bankruptcy and insolvency' (S. 91(21)), 'patents of inventions and discovery' (S. 91(22)), 'copyrights' (S. 91(23)), and 'marriage and divorce' (S. 91(26)) would probably have been held to come within the provincial head of property and civil rights (S. 92(13)) if they had not been specifically enumerated in the federal list. If not specifically enumerated they would therefore have been excluded from the peace, order and good government language, since it does not include provincial heads of power.

The conflicting views which have been outlined above clearly demonstrate the diversity which prevails in interpreting the nature of the peace, order and good government power. The judicial pronouncements on the subject, as discussed later, have been equally vacillating. However, as the peace, order and good government clause permits the creation of a new federal head of power to deal with an emergency or for other purposes, it is hoped that the judicial pronouncements in the near future would evolve a definite test to interpret this clause which would "render most provincial power nugatory".[8]

C. The Development of Emergency Doctrine

The development of the emergency doctrine within the peace, order and good government clause can be traced back to the Privy Council decision in Russell v. The Queen (1882)[9] in which the Privy Council upheld the Canada Temperance Act, a federal statute which established a local option temperance scheme in order to allow for the application of a remedy by the federal government "to an evil which is assumed to exist throughout the Dominion".[10] Subsequently, the Privy Council could only support Russell on the assumption that Canada was a nation of drunkards at the time, and that "the National Parliament was called on to intervene to protect the nation from disaster".[11] The situation forty years after Russell was seen in retrospect as having been analogous to an epidemic of pestilence.

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[8] Ledermann, Supra, n. 7, p 603.

[9] (1882) 7 App. Cas. 829.

However, it was in the Local Prohibitions case[12] that Lord Watson speaking for the Privy Council laid down as to when the federal intervention under the peace, order and good government clause in local and provincial matters would be justified. Enunciating the "national dimensions" doctrine for the first time, he stated that the federal intervention is proper if the matter has attained:

> such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.[13]

Though both Russell and the Prohibition case in effect laid down that federal Parliament can under the peace, order and good government clause intervene in the local matters if they are of national concern, but a recognizable emergency doctrine was developed by Lord

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[10] Ibid., at p 842.

[11] Toronto Electric Commissioner v. Snider, (1925) A.C. 396, at p 412.

[12] Attorney-General for Ontario v. Attorney-General for Canada, (1896) A.C. 348.

[13] Ibid., at p 361.

Haldane only post World War I cases. In the Board of Commerce case (1922);[14] their Lordships were confronted by a 1919 Federal Act that purported to control trade combinations as well as hoardings - subjects that seriously interfered with "property and civil rights" and which are reserved to provinces under Section 92(13) of the B.N.A. Act. Rejecting the argument that such an enactment was permissible under the 'peace, order and good government clause' of S. 91, Lord Haldane said that such a legislation is possible "under necessity in highly exceptional circumstances". He stated that in normal times the distribution of powers under the heads of Ss. 91 and 92 would operate but that

> circumstances are conceivable such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either S. 92 or S. 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any heads enumerated.[15]

A few years later, in Toronto Electric Commissioner v. Snider,[16] the question arose whether federal legislation for the settlement of industrial disputes was valid. The Privy Council through Viscount Haldane held that it was not. While conceding that "strikes might spread and extend to other business leading to an industrial paralysis" comparable to "war, famine or rebellion" which would justify federal intervention under Section 91 of the B.N.A. Act, Lord Haldane held that no great national emergency existed when the law was passed in 1907.

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[14] In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919, (1922) 1 A.C. 191.

[15] Ibid., at p 197.

[16] (1925) A.C. 348.

The federal statute, moreover, was not framed specifically to meet an emergency but was "essentially a sedative measure" and the peace, order and good government power was available only in "cases arising out of some extraordinary peril to the national life of Canada, such as the cases arising out of a war".[17] Thus Lord Haldane in post World War cases took Watson's "dimensions" test and made it so narrow and rigorous that the ambit of the peace, order and good government clause would embrace only emergency situations.[18]

The view of Lord Haldane was affirmed by Duff CJC in reference re Natural Products Marketing Act[19] and by Lord Atkin in the "new deal" cases.[20] It was also followed in the Margarine Reference.[21]

The "national dimensions" test enunciated by Lord Watson in Local Prohibition case, did reappear briefly in Aeronautics Reference,[22] Radio Reference[23] and the Empress Hotel case.[24] In A.G. for Ontario v.

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17. Ibid., at p 412.

18. McConnell, W. H., Commentary on the British North America Act, (1977), p 146.

19. Attorney-General for British Columbia v. Attorney-General of Canada, (1937) A.C. 355.

20. The "new deal cases" in the Privy Council consisted of: A.G. Can. v. A.G. Ont. (Labour Conventions), (1937) A.C. 326; A.G. Can. v. A.G. Ont. (Unemployment Insurance), (1937) A.C. 355; A.G. B.C. v. A.G. Can. (Price Spreads), A.G. B.C. v. A.G. Can. (Natural Products Marketing) (1937) A.C. 377; A.G. B.C. v. A.G. Can. (Farmers' Creditors Arrangement) (1937) A.C. 391; A.G. Ont. v. A.G. Can. (Canada Standard Trade Mark) (1937) A.C. 405.

21. Can. Federation of Agriculture v. A.G. for Quebec (1951) A.C. 179.

22. (1932) A.C. 54.

23. (1932) A.C. 304.

24. Canadian Pacific Railway Co. v. A.G. for British Columbia (1922) A.C. 122.

Canada Temperance Federation,[25] it was reformulated to what has been termed as Canada Temperance test to interpret the extent of federal Parliament's power under the peace, order and good government clause. Evolving the test, their Lordships' held:[26]

> the true test must be found in the real subject matter of the legilsation: if it is such that it goes beyond local or provincial concern or interests and must from it inherent nature be the concern of the Dominion as a whole (as, for example, in Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures.

The Temperance test, which was not followed in two subsequent cases[27] decided by the Privy Council, found favour with the Supreme Court of Canada after the abolition of appeals to the Privy Council.[28] While deciding the peace, order and good government cases, the Supreme Court of Canada relied heavily on the Temperance test and it was only in the Anti-Inflation Reference[29] that it reverted back to the emergency doctrine.

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[25] (1946) A.C. 193.

[26] Ibid., at pp 205-206.

[27] Co-op Committee on Japanese Canadians v. A.G. Can. (1947) A.C. 87 and Wartime Leasehold Regulations Reference (1950) S.C.R. 124.

[28] In 1949. Since then the Supreme Court of Canada has applied the Temperance Test with approval in Johanneson v. West St. Paul (1952) 1 S.C.R. 292, Munro v. National Capital Commission (1966) S.C.R. 663; Re Offshore Mineral Rights of B.C. (1967) S.C.R. 292.

[29] (1976) 68 D.L.R. (3d), 452.

II. THE WAR MEASURE ACT

Though there has been considerable controversy over the interpretation given by the Privy Council to the peace, order and good government clause, one aspect which has never been in doubt is that in time of emergency, such as that of war or national disaster, the federal Parliament has full powers to legislate, and in that case the power overrides all other powers in the B.N.A. Act.

The enabling statue to deal with emergency situations in Canada is that of War Measures Act,[30] which is quite similar to the Constitutional provisions in the Indian Constitution to deal with an emergency. The first War Measures Act was passed by the Parliament in 1914 and consolidated with some changes in the revised statue of 1927[31] and again in the revised statue of 1952. Even though in statue form, the War Measures Act was meant to be permanent and can be invoked by the Executive whenever deemed necessary.

The War Measures Act was first invoked during the World War I and the federal government embarked on extensive economic and other controls in regulations made under the Act. In Fort Francis Pulp and Power Co. v. Manitoba Free Press,[32] one such regulation by which the federal government had authorized the Minister of Customs to fix the quantity and price of newsprint paper, and which was continued temporarily after the war was challenged as being *ultra vires* of the Constitution because it trenched upon the provincial jurisdiction of "property

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30. R.S.C. 1952, now R.S.C. 1970, c. w-2.

31. R.S.C. 1927, C 206.

32. (1923) A.C. 695.

and Civil Right". Rejecting the contention, the Privy Council through Viscount Haldane held it to be a valid exercise of power by the federal Parliament under the peace, order and good government clause. Justifying the verdict, Lord Haldane said:[33]

> In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires S. 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial legislatures. But questions may arise by reason of the special circumstances of the nation emergency which concern nothing short of peace, order and good government of Canada as a whole...

This judgement was referred to in two cases after World War II when the War Measures Act had once again been proclaimed. In Co-operative Committee on Japanese Canadians v. Attorney General for Canada,[34] the judicial committee of the Privy Council upheld the validity of deportation Orders in Council passed under the War Measures Act and the National Emergency Transitional Powers Act, 1945 on the basis that "the Parliament of the Dominion in a sufficiently great emergency, such as arising out of War, has power to deal adequately with that emergency for the safety of the Dominion as a whole" on the same basis rent control during and after the war was upheld by the Supreme Court of Canada in Reference Re Validity of Wartime Leasehold Regulations.[35]

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33. Ibid., at pp 703-740.

34. (1947 A.C. 87.

35. (1950) S.C.R. 124.

A. The Actual Provisions

Section 2 of the War Measures Act states:

The issue of a proclamation by Her Majesty, or under the authority of Governor in Council shall be conclusive evidence that war, invasion or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

The words "shall be conclusive evidence" appear to make the proclamation of the Governor General non-justiciable and which compares with Article 352 of the Indian Constitution which explicitly lays down that the President's "satisfaction" in declaring an emergency cannot be questioned in any court of law. Though the Canadian Supreme Court and the Privy Council have repeatedly held that "the Governor in Council was the sole judge of the necessity or advisability of these measures"[36] and that "it is not pertinent to the judiciary to consider the wisdom or propriety of the particular policy which is embodied in the emergency legislation",[37] the opposite view that the "conclusive evidence" statement in the War Measures Act does not and never can sterilize judicial review as to whether an emergency has arisen or continues to exist has also been canvassed.[38] It has been supported by the following passages from the cases decided by the Privy Council.

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[36] Reference Re Validity of Orders-in-Council in Relation to Persons of the Japanese Race, (1946) S.C.R. 248, 277.

[37] (1947) A.C. 87, pp 101-102.

[38] See H. Marx, The Apprehended Insurrection of October, 1970 and the Judicial Function, (1972), 7U.B.C. Law Rev., pp 55-69.

Viscount Haldane in the Fort Frances[39] case:

> It may be that it has become clear that the crises which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for the distribution of powers in the ruling instrument (the B.N.A. Act) would have to be invoked. But very clear evidence that the crisis has wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite.

Lord Wright in the Japanese Canadians[40] case:

> Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliament of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

The issue was examined afresh by the Quebec Court of Appeal in Gangon and Valliers v. The Queen[41] in which the validity of the October 16, 1970, proclamation of the War Measures Act on the ground of "apprehended insurrection" was challenged. The Court while dismissing the plea again held that it was beyond its judicial competence to consider wisdom or propriety of such an action. This view came under severe criticism because unlike the two great wars, the very existence

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39. (1923) A.C. 695.

40. (1947) A.C. 87.

41. (1971) Que. C.A. 454.

of emergency in 1970 was being doubted and "by failing to distinguish between the permissible scope of regulations made under the Act, and the Constitutional power to bring the Act into effect in the first place, the Quebec judges sterlized the courts in their essential function of judicial review".[42] However, as the situation stands today, an order under Section 2 of the War Measures Act cannot be questioned in a Court of Law, which is equally true about the President's proclamation under emergency provisions of Indian Constitution. The Gangon and Valliers decision can be compared to the Supreme Court of India's verdict in A.D.M. v. Shukla[43] in which the Court held that suspension of Article 21 (Protection of life and liberty) by the Presidential order forms a "blanket ban" and an individual who has been imprisoned or detained looses his *locus standi* to regain his liberty on any ground including *ultra vires* of some statutory provision or malafides".

Section 3 of the War Measures Act gives authority to the Governor General to do what he may deem necessary for "the security, defence, peace, order and welfare of Canada" including censorship; arrest; control of transportation; trading; production and manufacturing; and, appropriation, control, forfeiture, and disposition of property and use thereof. Section 4 authorizes the provision of penalties for violation of orders and regulations made under the Act. Section 5 states that no one detained may be released on bail, or discharged, without the consent of Minister of Justice.

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[42] Marx, Supra, n. 38, p 58.

[43] AIR 1976 SC 1207.

Section 6(1) states that Sections 3, 4 or 5 of the Act will operate upon the issue of the proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended exists. Subsection (2) states that such proclamation shall be laid before Parliament "forthwith" after its issue, or within fifteen days from the time Parliament reconvenes if it is not sitting. This is analogous to Article 352(2)(c) of the Indian Constitution which provides that the proclamation shall cease to have effect if not approved by the Parliament within two months. Subsection (3) states that if ten members of either House sign a notice of motion within ten days of the proclamation being brought before the Parliament, praying that the proclamation be revoked, then such motion shall be debated in the House, within next four sitting days. This provision ensures that opposition group in Parliament, if aggrieved by the decision of the government, will have an opportunity to debate the issue. Such provision is absent in the Indian Constitution thus eliminating any form of formal dissent to the proclamation.[44] Subsection (4) states that if both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect. Finally, subsection (5) states that anything done or authorized under the authority of this Act shall be deemed not to be an abrogation, abridgement, or infringement of any rights of freedoms recognized by the Canadian Bill of Rights. Subsection (5), in effect, is similar to Article 359 of the Indian Constitution which automatically suspends

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44. Although when the proclamation of emergency is tabled in the House for approval, members can raise questions and call for debate, but there is no explicit provision for the same.

Artcle 19 (guaranteeing seven "democratic freedoms") upon proclamation of a state of emergency under Article 352 and Article 358 which empowers the President to suspend any other fundamental right during the said period.

Section 7 states that any loss resulting from the operation of this Act may be compensated, Section 8 applies to the forfeiture of vessels or goods, and Section 9 states that a court may make such rules or prescribe such procedure as it deems necessary when dealing with Sections 8 and 9.

B. Consequences of Proclamation

A proclamation bringing into force the War Measures Act is in effect the "creation" of a power which gives the Governor in Council authority to trench on matters that are exclusively provincial.[45] The wide powers accorded to the Governor in Council under Section 3 of the War Measures Act operate as a transfer of power by immediately placing all power in the hands of Governor in Council--power which may concern provincial as well as federal matters. These powers that are given to the Governor in Council are so "inextricably mixed up"[46] in the Act that it is difficult to separate federal from the provincial in the resulting transfer of powers. Moreover, a regulation trenching on provincial jurisdiction could be adopted at a very short notice.

Pursuant to this legislation not only can the cabinet assume complete direction of economy, but the right as well to interfere extensively with the personal liberties of the people in the Country. During World War I, though enemy aliens were never rounded up, thousands were interned. In 1917, following the Bolshevik Revolution, thousands were interned even though they could not be classified as enemy aliens because the Soviet Union was not at war with Canada. In preparation for 1917 wartime election, the franchise was denied to those who had emigrated from Central Powers, i.e., the Prussian and the Austro-Hungarian empires, despite the fact that many of these were serving in the Canadian armed forces. Early in World War II, in addition to strict censorship of the press, and regulations prohibiting speech which could "prejudice recruiting" or "be prejudicial to the safety of the state or prosecution of the war", a great many organizations were declared illegal, and membership of them was made an offence.[47]

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[45] Marx, Supra, n. 38, p 58.

[46] A.G. for Canada v. A.G. for Ontario, (1937) A.C. 355, 367.

Perhaps the greatest impact of the drastic powers available to the government under the War Measures Act was on the Japanese Canadians during World War II, when more than 20,000 persons of Japanese origin were evacuated from the Canadian west coast and their property was sequestered and sold. The evacuation of these people was not as a result of their conduct, but as a result of fostering prejudice.[48] Further by a series of Orders-in-Council under the authority of the War Measures Act, the government provided for the deportation of Japanese from Canada; of the non-citizens as well as the citizens. These Orders-in-Council were made on December 15, 1945, some four months after Japan had surrendered and were continued in force by virtue

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47. Tarnopolsky, Supra, n. 2, p 327.

48. Marx, H., Emergency Power and Civil Liberties,(1970) 16 McGill Law Journal, 40, 83 citing F. E. La Violette, The Canadian Japanese and World War II, (Toronto, 1948), p 219 and n. 27.

of Section 4 of the National Emergency Transitional Powers Act. Also, a commission was to make inquiry concerning the activities, loyalties and extent of co-operation with the Government of Canada of Japanese nationals and "Japanese race" with a view of recommending in the circumstances of any such case whether such person be deported.[49] All this was being done though no Japanese-Canadian was ever charged with espionage or disloyalty.

The government requested an advisory opinion from the Supreme Court as to the validity of these orders and the Supremem Court, in a split decision, held that the orders were *intra-vires* except for the provision providing for the forced deportation of wives and children under sixteen.[50] When, on the request of the Japanese Co-operative Committee, the matter was referred to the Privy Council, all the Orders were held intra vires the Governor-in-Council by the Privy Council on the basis that almost unlimited powers are given to the Governor-in-Council by the War Measures Act.[51]

Similarly, in 1945, when a Russian cipher clerk defected from the Russian Embassy in Ottawa and revealed a spy network in Canada, the government proceeded under the National Emergency Transitional Powers Act which continued regulations in force under the War Measures Act and detained many persons for espionage. Many individuals who were detained or interrogated were not informed of the protections they had under the

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[49] Ibid., at pp 86-87.

[50] Reference Re Validity of Orders-in-Council in Relation to Japanese Race, Supra, n. 36.

[51] (1947) A.C. 87.

Canadian Evidence Act against self-incrimination. They were also denied access to Counsel and were not permitted to communicate with anyone.

These incidents shook the nation and caused increased concern about civil liberties and were probably a very strong factor in influencing Mr. Diefenbaker to introduce legislation to enact the Canadian Bill of Rights, and the parliamentarians to support its passage.[52] Nevertheless, the existence of a Canadian Bill of Rights in no way, of itself, prevents such action in future because Section 6(5) of the War Measures Act provides that any action taken pursuant to it is not in contravention of the Canadian Bill of Rights.

III. THE PROCLAMATION OF OCTOBER, 1970

The most recent resort to the emergency powers came on October 16, 1970, when the federal government invoked the War Measures Act on the ground that an apprehended insurrection existed. This proclamation, like the one made in India on June 25, 1975, was unprecendented and gave rise to serious doubts about the sanctity of a measure which could tamper with the civil liberties of the citizens even in peace time. The government, however, justified the invocation as an inevitable and necessary step to counter "a concerted effort to intimidate and overthrow the government and the democratic institutions...through planned and systematic illegal action, including insurrection".[53] In order to assess the validity of the government's invocation of the War Measures Act and its actions pursuant to Regulations issued under this authority and under the Public Order (Temporary Measures) Act which replaced these Regulations, it shall be necessary to follow the events up to October 16, 1970,--the date of invocation.

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[52] Tarnopolsky, Supra, n. 2, p 328.

[53] Premier Bourassa's letter to Prime Minister Trudeau dated 16th October, 1970, reproduced by Haggart and Golden, Rumors of War, Appendix F, p 304.

A. Events Leading to the "Emergency" in 1970[54]

The wave of terrorism by the Front de Libération du Québec (F.L.Q.) in the Province of Québec which, according to the government, was the main reason for the invocation of the War Measures Act, actually started some seven years before the powers under the War Measures Act were used. The rising tide of violence for which the F.L.Q. claimed a great deal of credit began on February 23, 1963, when a bomb was placed near CBC TV Antena on Mount Royal, and another one near the private English language radio station CKGM. The palcement of bombs in several areas of Montreal and Quebec City continued throughout that year and resulted in the death of two and arrest of about fifteen people. By 1964, the *modes operendi* of the F.L.Q. diversified and it started robberies of both banks and the military establishments--besides planting bombs. These activities continued until 1966 and were renewed in 1968 after a year's break. The terrorist violence followed an ascending curve during 1968 to 1970 and in February, 1970,[55] the police arrested two alleged members of the F.L.Q.

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[54] The primary sources for factual details have been: Tarnopolsky, The Canadian Bill of Rights, (1975), Chapter IX, Haggart and Golden, Rumors of War, (1971), Pelletier, The October Crises (English translation - 1971), Morf, Terror in Quebec, (1970), and Radwanski and Windeyer, No Mandate but Terror, (1971). All these books have extensive bibliographies.

[55] However, Tarnopolsky has stated that this incident took place in June, 1970, Supra, n. 2, p 333.

and uncovered a plot to kidnap the Israeli Consul in Montreal. Four months later half a dozen people were arrested in a cottage in Prevost in the Laurentians, where firearms, dynamite and documents concerning a plan to kidnap the United States Consul in Montreal were all discovered.

The escalating tide of terrorism touched a new height when on October 5, 1970, James Cross, the British Trade Commissioner in Montreal was kidnapped. His abductors, the "Liberation" cell of the F.L.Q., soon issued "Communiqué No. 1" which outlined the conditions for the release of their hostage. These included: (1) publishing the F.L.Q. manifesto in all newspapers and on French TV; (2) liberating certain named "political prisoners" and transporting them by plane to Cuba or Algeria; (3) paying a ransom of half a million dollars in gold ingots; (4) revealing the name of the informer responsible for recent arrests; and (5) ceasing all police activities in connection with the kidnapping. On 6th, October, two more communiqués were received. They betrayed great nervousness and impatience and threatened to "liquidate" the British diplomat. Next day another communiqué was received at a radio station demanding that the manifesto be read on TV the very same day. Because Cross was a foreign diplomat, the federal government's share of responsibility was assigned to the Department of External Affairs and Foreign Minister Mitchell Sharp, declared on TV that the demands of the kidnappers were unreasonable, but indicated his readiness to negotiate. On October 8, for "humanitarian reasons", the manifesto was read on the French TV and another communiqué received the same day demanded immediate cessation of all police activities. This was followed on October 9, by two more communiqués, giving the authorities until 6 p.m. on October, 10, to comply with the demands or else Cross would be "executed". The government responded to this by offering the abductors safe conduct to a foreign country or clemency before the Courts but rejected the rest of the demands.[56] However, even before the F.L.Q.'s reaction to the government's stand could be assessed, a new incident shook and startled the people of Quebec and Canada.

Perhaps dissatisfied with the way things were going and with the apparent softening of the kidnappers of Mr. Cross, another group which called itself the "Chénier"[57] cell of the F.L.Q., staged a second kidnapping taking Mr. Pierre Laporte, Minister of Labour of the Quebec Government away from his home. The group immediately let it be known through a private radio station that they supported the demands of the "Liberation" cell and asserted for the integral fulfilment of all the seven demands.

The week following the kidnapping of Mr. Laporte was quite eventful. Following the reading of the F.L.Q. manifesto on the airwaves and its subsequent publication, there were organizational drives to stage demonstrations in support of the demands made in the manifesto. On October 14, and 15, mass meetings of about 2,000 people, mainly students, were held in Montreal to press for the release of the political prisoners. During the same period, while various influential persons[58] of Quebec were suggesting that the government should negotiate with the F.L.Q., others including Premier Bourassa were seeking more powers to detain people and military support from the federal government to counter the F.L.Q. Late in the night on October 15, Premier Bourassa gave his government's "final viewpoint in its negotiations with the Front de Libération du Québec".[59] He rejected the freeing of twenty-three prisoners but assured the kidnappers of safe passage out of the country. All the other demands were also rejected.

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[56] Tarnopolsky, Supra, n. 2, p 333, Haggart and Golden, Supra, n. 54, pp 6-7.

[57] Chénier was the name of a patriot in 1837 rebellion. Source Pelletier, Supra, n. 54, p 157.

While the aforesaid events were taking place in Quebec, the federal government in Ottawa was contemplating "a drastic shift in tactics, for a show of strength which would leave no doubt about who was in control (of the situation)". The new tactics would "involve the reputation and prestige of the Trudeau administration and would be a transfusion of strength to Bourassa's, ending internal dissension and public feeling that the government was powerless to act".[60] During the same time the federal Cabinet must have contemplated the use of War Measures Act if there was no positive response by the F.L.Q. to Mr. Bourassa's appeal. Even in Parliament and the Press there were speculations that the government planned to proclaim a state of insurrection under the War Measures Act.[61]

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[58] These included Parti Quebecois leader Rene Levesque, editor of Le Devoir, Claude Ryan, Marcel Pepin and Louis Laberge, leaders of two major trade union groups in the Province. See Haggart and Golden, Supra, n. 54, pp 44-49, Tarnopolsky, Supra, n. 2, p 337, Radwaski and Windeyer, Supra, n. 54, p 58.

[59] Tarnopolsky, Supra, n. 2, p 337.

[60] Haggart and Golden, Supra, n. 54, p 42.

[61] See Ibid., at pp 44-45 and Tarnopolsky, Supra, n. 2, p 338.

At 3 a.m. on the morning of October 16, Prime Minister Trudeau received three letters from Quebec and Montreal, all urging the invocation of emergency measures to counter the situation. Premier Bourassa in his letter requested that "emergency powers be provided as soon as possible" because his government was convinced "that the law, as it stands now, is inadequate to meet the situation satisfactorily" - a view which was shared by the Mayor of Montreal city Jean Drapeau, Chairman of the Executive Committee, Lercien Saulnier and the Director of Montreal Police, M. Saint-Pierre in their separate letters to Prime Minister Trudeau and Premier Bourassa respectively.[62] These requests were acted upon, and within an hour, the War Measures Act and Regulations under it were invoked to enable the authorities to combat "apprehended insurrection". Thus for the first time, since its enactment in 1914, the War Measures Act was invoked during peace time.

B. Regulations under the War Measures Act

Once the War Measures Act is invoked, Regulations are passed to deal with the particular emergency at hand. In 1970, this was accomplished by the Public Order Regulations which were brought into force on October 16, 1970. Though it was not necessary for the government to submit the invocation of the Act or the Regulations under it for debate by Parliament, the government chose to do so and the House of Commons on October 19, voted 190 to 16 in favour of the government's decision to invoke the War Measures Act.

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[62] Ibid., Appendix F, pp 304-307.

Section 3 of the Public Order Regulations, 1970, declared that the F.L.Q. or any successor group that advocated force or the commission of crime in accomplishing governmental change in Canada was an unlawful association. Section 4 stated that any person who was or professed to be a member or officer of the unlawful association was guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. Section 5 laid down that a person who, knowing or having reasonable cause to believe that another person is guilty of an offence under the Regulations, assisted him in any way, was likewise guilty of an indictable offence. By Section 6, the owner, lesse, agent, etc. of a building or premesis who knowlingly permitted meetings of the unlawful association was also guilty of an indictable offence. Section 7 stated that a person arrested under Section 4 could be detained in custody without bail unless the provincial Attorney General agreed to his release and that such a person could be held up to 90 days without trial, at which time the person having the custody of the accused was to apply to a judge of a Superior Court of criminal jurisdiction to fix a date for trial.

Section 8 was a reverse onus clause, which laid down that in any prosecution for an offence under the Regulations, in the absence of proof to the contrary, evidence that any person attended any meeting of the unlawful association, or spoke publicly in advocacy for it was to be deemed proof that he was a member of the unlawful association. Such person was to be charged within seven days of his arrest, unless the provincial Attorney General ordered that such person be held for an additional 21 days. Sections 9 and 10 expanded police powers of arrest search and seizure. Similarly Section 10 permitted a police officer to enter and search without a warrant any place which he had reason to believe was being used for the purpose of promotion of unlawful acts, or where any person connected with such acts, might be found. Section 11 provided that any property which the police officer had reason to suspect could be of being evidence in any offence under the Regulations could be seized without a warrant and held for 90 days or till the final disposition of any pending proceedings in relation to the offence.

On December 1, 1970, the House of Commons passed the Public Order (Temporary Measures) Act, 1970[63] which received the Royal assent on December 5, and thereby revoked the War Measures Act. The major change in the Act over Regulations was that the new Section 9 laid down that within three days instead of the previous seven a person has to be charged and the provincial Attorney General could extend this time by seven days as opposed to the previous extension of 21 days. Also Section 8 had been changed so that a person should have been at a number of F.L.Q. meetings as opposed to one meeting in the Regulations, before it would be deemed that such person was a member of the unlawful association and Section 7 stated that a person could only be held without bail for 7 days, without an order from the provincial Attorney General, whereas the Regulations stated that a person could be held up to a period of 90 days, unless the Attorney General consented to the release of such person at an earlier date.

Section 12 of the Act declared that it would operate notwithstanding the Canadian Bill of Rights, although it was clarified that nothing

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63. Bill C-181, House of Commons of Canada.

in the act would prevent the application of paragraphs (a) to (g) of Section 2 of the Canadian Bill of Rights, except for those provisions dealing with arbitrary detention and denial of bail without just cause. Section 13 revoked the War Measures Act and Section 15 laid down that the Public Order (Temporary Measures) Act would expire on April 30, 1971, unless shortened by proclamation or lengthened by joint resolution of both the Houses of Parliament.

Thus the Public Order (Temporary Measures) Act which replaced the Public Order Regulations, without making a fundamental departure, did make certain changes which were less restrictive and provided a slightly higher degree of civil liberties than had its predecessor.

The crisis climaxed with the release of Mr. Cross on December 4, 1970, and his abductors were allowed to leave the country. The murderers of Mr. Laporte were arrested and were later convicted. The Public Order (Temporary Measures) Act was allowed to expire on April 30, 1971, thus bringing to an end the state of "emergency".

IV. THE CRITICISM

The government's action in issuing emergency regulations under the War Measures Act to deal with the October, 1970, crisis is open to a serious objection and that is: would not the usual procedures of criminal law have been sufficient to deal with the apprehended insurrection, assuming that there was one?

In order to analyse the aforesaid issue it is necessary to outline the provisions of the Criminal Code which could have been utilized against the F.L.Q. members. The proclamation invoking the War Measures Act, the emergency regulations issued thereunder, and the Public Order (Temporary Measures) Act, 1970, all refer to the resorting of F.L.Q.

members to murders, threats of murder, and kidnapping. Obviously, these are all serious criminal offences, and there are many other serious offences which cover the conduct of the revolutionaries, such as arson, malicious destruction of property, possession of explosives, possession of offensive weapons and firearms, threatening to injure or to destroy property, obstructing justice, resisting or obstructing a police officer and the like. Violence in all its manifestations, and whether directed against the person or property, is well and adequately covered under the criminal law.[64]

Similarly, if the assertion is made that it was not only the physical acts of violence which had to be countered but also the mental violence in the nature of treason and sedition had to be taken care of, then the fact is that the Criminal Code abounds with offences against such conduct. Section 46(2)(a) provides that everyone commits a treason who, in Canada, uses force or violence for the purpose of overthrowing the government of Canada or a province. Further, under Sections 46(2)(c) and (e), it is also treason to conspire with person to use force or violence, or to form an intention to do so and to manifest that intention by an overt act. Punishment for these offences could be imprisonment for life.[65] Similarly Section 50(1)(b) of the Criminal Code makes it obligatory for everyone who is aware of the fact that a person is about to commit treason must inform the

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64. For detailed discussion see D.A. Sclmeiser, Control of Apprehended Insurrection: Emergency Measures v. The Criminal Code, (1971) 4 Man. Law Journal, pp 359-365.

65. Section 47 of the Criminal Code.

responsible authorities about it. Failure to do so constitutes an indictable offence with imprisonment up to fourteen years. Thus most of the offences created by Sections 3 and 4 of the Public Order Regulations and subsequently by the Public Order (Temporary Measures) Act, 1970, were adequately covered by the provisions of the Criminal Code.

Finally there are very wide offences concerning sedition found in Sections 60 to 62 of the Criminal Code which take care of any of the offences created by the regulation or the Act which do not come within the purview of provisions of the code referred to above. According to these provisions, it is a serious offence to speak seditious words, publish a seditious libel or be a party to seditious conspiracy. Although the Supreme Court of Canada, in R v. Boucher,[66] has held that the prosectuion must also prove an intent on the part of the accused to produce disturbance of or resistance to established authority, but even this restriction leaves the definition of sedition very wide. Moreover, it would not have been difficult for the prosecution to prove the intent under the circumstances which prevailed during the time of the crisis. Further under the Criminal Law of Canada, it is not only the person who actually commits an offence who is party to it but Section 21 of the code lays down that a person is equally a party to an offence if he aids or abets a person to commit an offence and this provision could have been so used to round up the associates of the terrorists.[67]

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[66] (1951 S.C.R. 265.

[67] Schmeiser, Supra, n. 64, p 361.

As it turned out only two convictions were obtained for offences under Public Order Regulations and Public Order Act although some 497 persons in all were arrested. The majority of convictions were for Criminal Code offences and this adds strength to the argument that special statutory enactments were not necessary to deal with the crisis of October, 1970.

Another consequence of the special emergency measures was the wide scale temperance with the civil liberties of the citizens. This was because the powers of arrest, search and seizure available to the police were broader than those under the Criminal Code and had practically no checks on them. For example, under Section 450 of the Code, a peace officer may arrest without warrant on "reasonable and probable grounds" rather than just where "he has reason to suspect" an offence being committed. Similarly, Section 10 of the Public Order Regulations permitted peace officers to enter, search and seize any premisis merely on the ground that "he has reason to suspect" that some unlawful activity is being carried on there; whereas under Section 443 of the Criminal Code it is necessary for a peace officer, before he undertakes any such act, "to obtain a search warrant from a justice who is satisfied by information upon oath...that there is reasonable ground to believe" that the search will reveal evidence that an offence is about to be or has been committed.

The provisions in the Public Order Regulations concerning power of detention and granting of bail to the detenues were also quite stringent. A person could be arrested and detained without being charged for a maximum period of twenty-eight days and a charged person could be refused bail pending trial unless the Attorney General consented his release. In effect, the emergency regulations conferred wide discretionary powers on the police officers, thereby taking the element of reasonableness out of their actions.

After the crisis was over complaints were made about the police brutality and mistreatment of prisoners which were later investigated by a three-man committee. Later on, the Quebec Public Prosecutor (Ombudsman) announced that he had investigated complaints about damage to property, unjust conditions of detention, personal injury and damage to reputation. One hundred and four complaints were found to be just and compensation was paid.[68]

Further, a pointed criticism has also been made of the Public Order Regulations, 1970, and the Public Order (Temporary Measures) Act, 1970, on the basis that judicial decision was replaced by executive judgement in an area of law that was closely linked to the judiciary.[69] It was contended that Sections 3 and 4 of the Public Order Regulations, which were so closely drafted from Sections 60 and 62 of the Criminal Code, were unconstitutional because they took away the procedural safeguards provided by the Code and created a criminal class action. "The judiciary was reduced to a role of time keeper (and) criminal guilt was determined by executive decree."[70] This argument was raised in the Gagon and Vallières case[71] and was supported by the Privy Council

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68. Tarnopolsky, Supra, n. 2, p 347.

69. See J. N. Lyon, Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970, (1972) 18 McGill Law Journal pp 136-144.

70. Ibid., p 140.

71. (1971) Que. C.A. 454.

decision of Liyange v. The Queen,[72] an appeal from the Supreme Court of Ceylon. The Quebec Court of Appeal however, distinguished Liyange from Gagon and Vallières and held that Canadian emergency legislation did not usurp the judicial function.

In sum, it can be said that the emergency Regulations and the Act were not necessary to deal with the October, 1970, crisis. As detailed above the situation could have been well handled by the existing provisions of the Criminal Code thus ensuring that the civil liberties of the innocent citizens, who were unnecessarily caught in what was otherwise a routine confrontation between the authorities and the terrorists, remained unaffected. After the crisis was over, many believed that the remedy was worse than the disease as it implanted in the Canadian political consciouness a number of dangerous precedents. Besides permitting the use of force by the government to suppress its political adversaries, it exemplified the notion that procedural guarantees and the due process constitute an impediment to democracy, rather than its bulwark.[73] Was it necessary to have such a terrifying social upheaval to achieve this result?[74]

V. EMERGENCY POWERS IN PEACE TIME

Besides war and insurrection another crisis which can confront a nation and which requires emergency powers to deal with is that of economic depression. Whereas under the Indian Constitution specific provisions have been made which empower the federal government to take necessary steps to counter any "financial" emergency, in Canada authority for any such measure by the federal government is drawn from the opening words of Section 91 of the B.N.A. Act. Yet, the Courts have generally disallowed any meaningful use of the federal powers to deal with the state of economic depression.[75] The Courts have repeatedly held that federal intervention under the peace, order and good government clause is only permissible if the matter has attained "such dimensions as to affect the body politic"[76] and may cause "some extraordinary peril to the national life of Canada".[77]

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[72] (1967) I.A.C. 259.

[73] Haggart and Golden, Supra, n. 54, p 271.

[74] Schmeiser, Supra, n. 64, p 365.

However, in the Anti-Inflation Reference,[78] the Supreme Court upheld the federal Anti-Inflation Act, 1975, as an emergency measure. The Act provided for price and income controls in the private as well as public sectors of the economy and in those areas that fall under exclusive provincial as well as federal jurisdiction. The preamble to the Act explained that "the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and the containment and reduction of inflation has become a matter of serious national concern". The Act was temporary and was to expire automatically on the 31st December, 1978, unless terminated earlier or extended by the government with the parliamentary approval. Although there was no explicit declaration that the Act purported to deal with an "emergency" situation, the Supreme Court of Canada through Laskin, CJ., (Judson, Spence and Dickson, JJ. concurring) held that:[79]

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[75] See the Privy Council decisions In Re the Board of Commerce Act Case (1922) I.A.C. 191 and the "new deal" cases which have been detailed in n. 20, Supra.

[76] Attorney General for Canada v. Attorney General for Ontario, (1937) A.C. 326, 352.

[77] Ibid., at p 353.

[78] (1976) 68 D.L.R. (3d) 452.

> the preamble to the Act was sufficiently indicative that Parliament was introducing a far reaching programme prompted by what was in its view a serious national concern and the absence of the very word "emergency" was not unduly significant.

In the same judgement Chief Justice Laskin provided a "rational basis" test for the validity of an emergency legislation. He set out the test as follows: "Does the extrinsic evidence put before the court, and other matters on which the Court can take judicial notice without extrinsic material to back it up, show that there was a rational basis for the Act as crises measure?" To this if "very clear evidence" rule formulated by the Privy Council in the Japanese Canadians case[80] and followed ever since is added, the rule can be reformulated as follows: very clear evidence has to be adduced to show that there is no rational or reasonable basis for the emergency legislation thought necessary by Parliament. Applying this test and after reviewing the evidence, the Chief Justice stated that the[81] "Court would be unjustified in concluding...that the Parliament of

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[79] Ibid., at p 495.

[80] (1947) A.C. 87. For the rule see the passage cited from the case on page 70 Supra.

[81] (1976) 68 D.L.R. (3d) 452 at 498.

Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgement, was temporarily necessary to meet a situation of economic crises". However, the Chief Justice's reasoning does not explain as to how can a litigant possibility prove that an inflation related emergency has not arisen or has passed? Similarly, what about apprehended inflation?[82]

Another important issue which came to the fore in Anti-Inflation Reference was regarding the extend of admissibility of extrinsic material as evidence in a purely constitutional case.[83] Chief Justice Laskin held that[84] "the extrinsic material need go only so far as to pursuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity". However, Ritchie J., with whom Martland and Pigeon JJ. agreed, found that the Anti-Inflation Act would be *ultra vires* except in an emergency or crisis. In his view, when the Act was read against the background of the White Paper presented in Parliament, it becomes apparent that the Parliament had passed the Act to combat an emergency.[85] Thus impliedly, Ritchie J. held that extrinsic material is relevant and is admissible, especially in cases like the one under disucssion. Beetz J., with whom de Granpre J. agreed, dissented on the question whether the Act was valid. In his opinion, for Parliament to rely on its emergency power required a clear indication in the title, preamble or text of the statute that Parliament was indeed relying on its emergency powers. Since Parliament had not relied on the emergency power, in Beetz J's view, it was not necessary for his lordship to consider whether the extrinsic material provided the basis for a finding of emergency--though he did cite various passages from Hansard which suggested that the government had not been relying on the existence of an emergency in introducing and supporting the Act.[86] Thus, it is fair to conclude that he too was of the opinion that extrinsic material is not inadmissible.

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[82] Chevrette and Marx, Comments (1976) 54 Can. Bar Rev., p 740.

[83] The Anti-Inflation Act was a measure to counter double digit inflation which Canada was experiencing at that time. In order to find out whether it (the inflation) caused an emergency or not, it was necessary to consider extensive material as evidence. While it was widely agreed that inflation at a rate of 10-11% per annum is undesireable, not many people were prepared to rank such inflation with either two great wars or the depression of the 1930's and accordingly proof of facts to support or oppose the measure had become relevant. For detailed discussion see R.B. Burlass, The Use of Extrinsic Evidence and the Anti-Inflation Act Reference (1977) 9 Ottawa Law Rev. pp 177 to 191 and P.W. Hogg, Proof of Facts in Constitutional Cases, (1976) 26 University of Toronto Law Journal, pp 386-403. Also see Ref. re Alberta Legislation (1938) 4 D.L.R. 433 at 438-39, A.G. Alta. v. A.G. Can. (1939) A.C. 117 at 130, Lower Mainland Dairy Products Board v. Turner's Dair Ltd. (1941) 4 D.L.R. 209 at 216.

[84] (1976) 68 D.L.R. (3d) 452 at 496.

In sum, it can be said that according to Chief Justice Laskin's interpretation of the "peace, order and good government clause" in the *Anti-Inflation Reference* Case, federal Parliament can use its emergency powers at will. His approach and reliance on *Russell* has been a source of criticism for many.[87] The judgements of Ritchie and Beetz JJ. have generally been preferred as they are consistent with the preservation of basic proposition of Sections 91 and 92: that there must be a realistic limit on legislative power of Parliament. Concluding his comments on the outcome of the case Albert S. Abel has stated:[88]

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[85] Ibid., at p 509 where his Lordship has remarked that "a judgement declaring the Act to be *ultra-vires* could only be justified by reliance on very clear evidence that an emergency had not arisen when the statute was enacted."

[86] Ibid., see pp 534-535.

> This is a notoriously landmark decision. But what has it decided? It has explored more thoroughly than ever before the meaning of the general power, yielding it is true no satisfactory or definitive answer but setting out the alternatives in a way that would stimulate and organize further consideration which could lead to one. It has decided the purely circumstantial question that nothing was produced sufficient to overthrow parliament's conclusion that an emergency existed by reason of inflation. It has been decided that the act's provisions standing alone were not so inherently incapable of application to any matter open to parliament to regulate as an exercise of its authority as to the peace, order and good government of Canada as to call for holding it ultra-vires.

VI. LIMITATION ON THE FEDERAL EMERGENCY POWER

The only important limitation on the federal emergency power is that the legislation of the federal Parliament to deal with a particular emergency should be of temporary nature because "the exercise of emergency powers amounts to pro-tanto amendment of the Constitution by the unilateral act of the Parliament"[89] which in turn permits the federal Parliament to legislate on matters which otherwise fall exclusively under the provincial jurisdiction. There is nothing unusual about this limitation as literally emergency has been defined as "a sudden and unexpected turn of events calling for immediate action"[90] and any steps which are taken to correct the situation ought to be temporary in character so as to bring the situation back to normal. Explaining the rationale Ritchie J. has said:[91]

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[87] See Mackenzie, J.A., The Anti-Inflation Act and Peace, Order and Good Government (1977) 9 Ottawa Law Rev. pp 169-175 and Lyon N., The Anti-Inflation Act Reference: Two Modes of Canadian Federalism (1977) 9 Ottawa Law Rev. pp 176-182.

[88] Abel, A.S., The Anti-Inflation Judgement: Right Answer to Wrong Questions, (1976) 26 University of Toronto Law Journal, p 409, 450.

[89] Per Beetz, J. in the Anti-Inflation Reference (1976) 68 D.L.R. (3d) 452 at 528.

> The authority of Parliament (under the emergency powers) is limited to dealing with critical conditions and the necessity to which they give rise and must perforce be confined to legislation of temporary character.

However, the distinction between temporary and permanent character of statutory measures is quite thin and the usefulness of this distinction is primarily formal, because an ostensibly temporary measure can be continued in force by the Parliament for a longer time than initially enacted, while an ostensibly permanent measure can be repealed at any time. In his dissent in the Anti-Inflation Reference, Beetz J., raised the same doubts when it was contended before him that beside other reasons, the measure (Anti-Inflation Act) is temporary in nature and hence is not *ultra-vires* of Parliament's power to legislate during a period of national emergency. Elaborating the point His Lordship remarked:[92]

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[90] Funk and Wagnalls, p 208.

[91] (1976) 68 D.L.R. (3d) 452 at 507.

[92] Ibid., at pp 531-532.

> Counsel for Canada has also insisted upon the temporary nature of the Anti-Inflation Act. I note that the duration of the act could, under S 46, be extended by Order-in-Council with the approval of both Houses of Parliament, although I am not inclined to attach undue importance to this point. Nonetheless, while it would be essential to the validity of a measure enacted under the national emergency power of Parliament that it be not permanent, still the temporary character of an act is hardly indicative and in no way conclusive that it constitutes a national emergency: Parliament can and often does enact temporary measures relating to matters coming within its normal jurisdiction.

Nevertheless, no permanent measure had ever been upheld by the Courts under the emergency power. In The Board of Commerce case,[93] the legislation to control hoarding and profiteering caused by the economic conditions prevailing after the First World War was held to be unconstitutional. The Privy Council, while holding that the impugned legislation was neither enacted to meet special conditions of war time nor the peace time economic problem could be characterized as emergency, was also influenced by the ostensibly permanent character of the proposed controls. Similarly, in the "new deal"[94] cases, certain statutes which were enacted to deal with the depression of 1930's failed to satisfy the "emergency" test because their Lordships were of the view that depression did qualify as genuine emergency. However, it is fair to assume that the decision was also influenced by the permanent nature of the measures. Thus, it is established that in order to qualify as federal emergency measure, a statute must not be of permanent nature and the Supreme Court's decision in the Anti-Inflation case reaffirms this.

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93. (1922) I.A.C. 191.

94. See Supra, n. 20.

VII. EMERGENCY DOCTRINE AND THE FUTURE

Between 1914 and 1976 Canada has been subject to emergency federal legislation for about 40 per cent of the time.[95] Throughout both World Wars and for a time afterwards, during the Korean War, at the time of apprehended insurrection, and during mid 70's at the time of economic crises caused by inflation, legislation was in effect that permitted the federal authorities to deal with the matters that are normally under exclusive provincial jurisdiction. It is a strange phenomenon to take place in a country which is committed to federalism, because excessive use of emergency powers tends to weaken the concept of federal principle embodied in the B.N.A. Act. Another effect of the emergency legislations has been the imposition of restrictions on normal civil liberties by the government during war and insurrection emergency periods.

For future also, no major change can be anticipated because the Parliament and the federal government are not at all hesitant to support overriding legislations on this constitutional doctrine and courts have time and again declared such enactments as valid exercise of power by Parliament under Section 91, the opening words of which permit the temporary transfer of any subject by virtue of emergency power.

The frequent exercise of emergency power by the federal Parliament can be curbed to an extent if the courts instead of interpreting the "peace, order and good government" clause literally, thereby permitting the federal Parliament to legislate at will, starts construing it narrowly. This approach, again, has institutional impedements because Parliament in Canada is sovereign[96] and it shall be extremely difficult for the courts to question the wisdom of Parliament's action. Although the Courts, on many occasions in the past have disallowed federal legislations based on emergency powers unless they were meant to cure some exceptional circumstances which could have put the national life of Canada in unanticipated peril, but there are court pronouncements which indicate that federal Parliament can validly legislate under the powers conferred by Section 91 on any matter if it "goes beyond local or provincial concern or interest and must form its inherent nature to be the concern of the Dominion as a whole".[97] This would mean that the federal power under the peace, order and good government clause is not residuary but general in nature and the Parliament can legislate on any matter unilaterally if it thinks that the that the subject matter of the legislation is of national concern. To sum up, it can be said that the judicial interpretation of the peace, order and good government clause has varied over the years and it is far from settled. Unless the concept of limited government (a government working within the Constitutional framework provided by a written constituion) is introduced in the Canadian polity which should clearly enumerate various heads of legislative power and also provide, if so desired, the specific grounds on which a state of national emergency could be declared which would make it mandatory for the federal Parliament to follow "manner and form" before empowering itself with overriding emergency powers, it is hard to imagine how federal Parliament could be discouraged to trench on provincial matters time and again.

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[95] Chevrette and Marx, Supra, n. 82, p 738.

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[96] Although it is functionally circumscribed by the federal principle embodied in the Constitution and the written division of powers between the federal government and the local units, still the preamble of the B.N.A. Act which recites that the Constitution of the Dominion will be similar in Principle to that of U.K., clearly indicates that any unit, federal or provincial, acting in its appropriate jurisdictional sphere enjoys sovereignty. See Hodge v. R (1883), 9 App. Cas. 117.

[97] A.G. Ontario v. Canada Temperance Federation (1946) A.C. 193, at 204-205. Cited with approval in series of cases by the Supreme Court of Canada which have been listed in n. 28 Supra.

VIII. WAR MEASURES ACT - SUGGESTED CHANGES

War Measures Act, which is designed to deal with the emergency created by war or insurrection, real or apprehended, permits the government to interfere with the civil liberties of the citizen which is often excessive and unwarranted. In order to eliminate the obnoxious features of the Act, it is desired that certain changes be made in the nature and form of statute. Some of the desired changes have been broadly referred to below:

(i) The application of the War Measures Act to deal with insurrection, real or apprehended, be completely eliminated. This recommendation has been influenced by three considerations:

Firstly, such a provision is too convenient a remedy for the executive to curb or crush any dissent directed against the policies of the government in form of a social or political movement--an exercise which is legitimate in a country professing to guarantee "political freedoms". It can also be used to divert attention from government failures, if a group or organization is trying to make an issue out of it. Further, both the 1970 Canadian crises, and the emergency in India would indicate that the Executive has a tendency to use indiscriminately or misuse such powers thereby causing agony to scores of innocent people. No doubt, Parliament can stall such a measure by refusing to give its approval but government majority in Parliament is virtual guarantee of Executive's wishes.

Secondly, insurrection like armed rebellion as a ground for declaring a state of national emergency under Indian Constitution is an inprecise concept, for it is difficult to assess if the organized resistance has any intentions to establish a different government or is merely highlighting genuine grievances. In any case, the government has sufficient machinery to repeal force by force without needing any extraordinary remedy as provided by the present War Measures Act.

Thirdly, as discussed earlier, a country such as Canada that is well educated and typically placid and is geographically dispersed, could satisfactorily be controlled by Criminal Code legislation and there is no need to have any emergency legislation to deal with internal disturbances or so called insurrection.

(ii) Even if it is decided to retain insurrection, real or apprehended, as a ground to invoke War Measures Act, it is suggested that provision should be made by which the operation of the Act could be confined to a particular region or province depending upon the necessity and consent of provincial legislature. As the situation stands today, if the War Measures Act is invoked to deal with an emergency situation confined to a particular region of the country, its consequential powers, nevertheless, would be available to the executive all over the country. For example, in October, 1970, although the War Measures Act was invoked to deal with the crises caused by the F.L.Q. in the province of Quebec, the Public Orders Regulations made thereunder could have been applied to any other group whether in Quebec or in other parts of Canada.[98]

(iii) The War Measures Act should not have complete precedence over the Bill of Rights.[99] Instead, during the time of emergency when the War Measures Act is in operation, the Executive should be empowered to impose "reasonable" restrictions on civil liberties and what is "reasonable" could be decided by the Courts considering the necessity of the situation.[100] Commenting on the present position of the Bill of Rights *vis-a-vis* the War Measures Act, Prof. Marx has said:[101] "when the government interference with civil liberties is most likely, protection of these liberties is least available".

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98. Under section 3 of the Public Order Regulations.

99. Section 6 of the Bill of Rights repealed section 6 of the War Measures Act and substituted it with a new section 6. Clause (5) of the said section provides that

> "Any Act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights".

100. This suggestion has also been included in the policy paper presented by the federal government during Constitutional Conference in 1968. While discussing the limitations which may be imposed on the civil liberties of the citizens during a period when the War Measures Act is in operation, it suggested that "(iii) no mention of any exception (in the Bill of Rights), thus permitting the courts to determine what limitations are made necessary in times of crises (many of the guarantees in the United States Bill of Rights are stated without qualification. Yet the American courts have recognized that some of them may be limited in times of war)." P.E. Trudeau, A Canadian Charter of Human Rights, (1968), p 30.

101. Marx, Supra, n. 48, p 72.

(iv) Finally, Parliament can exercise effective control over the executive actions during a period when the War Measures Act is in operation. It could question the government in the House as to the necessity of a particular measure or could press for narrowing the powers delegated to the Governor-in-Council under the Act.

Although Section 6(3) of the War Measures Act provides that when an emergency is proclaimed, a motion can be made in either House by ten members asking that the proclamation be revoked and that motion is debated, but for more efficient parliamentary supervision over the government, it is desired, that the proclamation of an emergency should itself operate to automatically require a debate in the House and ratification of the government's action.

CHAPTER THREE

I. THE ENTRENCHMENT QUESTION

A. Introduction

Having enacted a Bill of Rights,[1] the issue which is now confronting the Canadians in whether or not it should be entrenched in the constitution.[2] And as is typical of Canadian constitutionalism, despite efforts, no consensus has been reached on it. In this Chapter attempt has been made to delineate the trends and tendencies regarding the entrenchment of a Bill of Rights, which to some is nothing but merely a "hollow declaration capable of doing more harm than good" while to others it is a guarantee of their liberties and equal participation in shaping and sharing of values of Canada.[3] Before such an elaboration is attempted, it shall be necessary to briefly outline the meaning, nature and purpose of Bill of Rights because the expression could be used to designate widely different juridical conceptions.

B. Bill of Rights - Its Meaning and Nature

Bill of Rights as is commonly understood is nothing but a formal summary and declaration of the fundamental principles and rights of individuals. The rights so conferred are different from the ordinary legal rights which an individual enjoys because while an ordinary legal right is protected and enforced by the ordinary laws of the land, a fundamental right is protected and guaranteed generally by a written constitution of a state. This is because the fundamental law or fundamental rights are, offsprings of 'natural law' and 'natural rights', i.e., of a law which stands above the positive law created by the political sovereign and of a right which is antecedent to the political society itself, being the primary condition of any civilized existence. As these rights are guaranteed by the Constitution itself, they can neither be altered by any other statute nor can they be suspended arbitrarily, unless the Constitution itself makes any such provision. Further, being a part of the fundamental and paramount law of land, no organ of the state - Executive, legislative or judicial can act in contravention of such rights and any state action which is repugnant to such rights is void.

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[1] 8-9 Elizabeth II, c 44.

[2] Constitution here means British North America Act, 1867, as amended up to date.

[3] Bharadwaj, V.K., Canada and Entrenched Bill of Rights: A Visitor's Viewpoint, (1972) 14 JOILI, p 187, 189.

In fact, no right can be said to occupy a supremely eminent position or can be classified as 'fundamental', if it can be overridden by the legislature and if there is no authority under the Constitution to pronounce a law invalid where it contravenes or violates such rights directly or indirectly. Accordingly, an entrenched Bill of Rights is necessarily accompanied by an extensive right of judicial review.

C. Purpose of Bill of Rights - American and British Points of View

The object behind the inclusion of certain individual rights in a bill of rights is to establish a 'limited government', i.e., a governmental system in which absolute power is not vested in the hands of any of the organs of the state. The concept of limited government is what the Americans know as "a government of laws and not of men"

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and which is based on the sovereignty of the people.[4] This concept, being the antithesis of the English doctrine of parliamentary sovereignty, can be explained only if an analysis of the ideological differences involved in the two concepts is undertaken.

In England, the birth of modern democracy was due to the protest against the absolutism of an autocratic executive and the English people discovered in parliamentary sovereignty an adequate solution of the problem that faced them.

The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives and that faith does not seem to have waned through the lapse of centuries. On the other hand, the founding fathers of the American Constitution had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial empire. Thus, the Declaration of Independence, 19776 recounts that the object of the British King was the "establishment of an absolute tyranny over (colonial) states" and how the British "legislature (attempted) to extend an unwarrantable jurisdiction over us".[5]

Hence, while the English people, in their fight for freedom against autocracy stopped with the establishment of the supremacy of the law[6] and of Parliament as the sole source of that law,[7] the American had to go further and to assert that there is to be a law superior to the legislature itself and that it was the restraint of this paramount written law that could only save them from the fears of absolutism and autocracy which are inherent in human nature itself.

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[4] Constitution of Massachusetts, 1780; Art. XXX, reproduced in B. Schwartz, The Bill of Rights - A Documentary History, Vol I, (1971), p 339. Also see Marbury v. Madison (1803) 1 Cr. 137(163).

[5] See Ibid. at pp 252-254.

[6] Magna Carta, 1215.

[7] Petition of Rights, 1628; Bill of Rights, 1688.

Explaining the purpose of American Bill of Rights, Justice Jackson has said in Board of Education v. Barnette:[8]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities...and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections.

So the American Bill of Rights is equally binding upon the legislature as upon the Executive. The job of protecting the rights and freedoms secured by the American Bill of Rights is entrusted to the judiciary armed with the power and duty of invalidating any laws infringing upon these rights and freedoms, which may only be modified through the process of constitutional amendment. From this, it is fairly obvious that a Bill of Rights on the American pattern is directly linked up with the process of constitutional amendment and indirectly with the Constitution of the supreme judicial authority.[9]

In England, on the other hand, the Constitution is unwritten and it does not have a code of fundamental rights. This, however, does not mean that in England there is no recognition of those rights of the individual without which democracy becomes meaningless. As elsewhere, the judiciary is the guardian of individual rights in England too, but there is a fundamental difference. While the judiciary has fullest powers to protect individuals against executive tyranny, it is powerless as against legislative aggression, if any, upon individual rights. Further, the English legislature being theoretically 'omnipotent', there is no law which it cannot change. Consequently, there is no right which may be said to be 'fundamental' in the proper sense of the term. Although there are proclamations of certain individual rights in some constitutional charters and documents like *Magna Carta* and the *Bill of Rights*, but these charters were merely declaratory of the existing common law, and were intended to be binding upon the executive and not upon Parliament.

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[8] Board of Education v. Barnette (1943) 319 U.S. 624.

[9] Pigeon Louis-Phillipe, The Joint Committee on Human Rights, (1948), 26 Can. Bar Rev., p 706, 712.

Thus, at any time the rights of citizens in England are merely the residue of freedom left after the restrictions placed on the activity of the citizens by the legislature are defined.[10] Elaborating the point, House of Lords has remarked[11]

> All the Courts today and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law... It is a regulated freedom... In the constitution of this country, there are no guaranteed or absolute rights. The safeguard of British Liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.

Thus, the supremacy of Parliament and absence of the right of judicial review to the Courts leads to the query as to what protects individual liberty in England against the inroads of omnipotent Parliament. The answer, according to Halsbury[12] is that in England "It is well understood that certain liberties are highly prized, and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them". The inordinate love for liberty, cherished by Englishmen, for centuries, enables them to hold the just balance between power and liberty. Even in England now there is gathering momentum towards a written Bill of Rights.[13]

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[10] See Dicey, Law of the Constitution, 10th Ed., ch. V, Allen, Law in the making, (1947), p 252.

[11] Liversidge v. Anderson, (1942) A.C. 206, per Lord Wright.

II. CANADIAN BILL OF RIGHTS

A. Introduction

There are few provisions under the British North America Act[14] which explicitly confer any fundamental or individual rights on the citizens of Canada. This is not so because of the indifference of the fathers of Confederation towards the rights of the individuals but because they thought that under the parliamentary democracy based on true British traditions such a guarantee was neither desireable nor feasible. To make certain that the British Common Law traditions are adequately embodied in the B.N.A. Act they indicated in the preamble that the constitution of the Dominion would be "similar in Principle to that of the United Kingdom". Nevertheless, the B.N.A. Act did guarantee the rights and privileges of denominational schools under

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[12] Halsbury, Law of England, IVth Ed., Vol. 8, para 828.

[13] See Wade and Phillips, Constitutional and Administrative law, (1977), p 510.

[14] Hereinafter referred to as the B.N.A. Act.

Section 93 and the linguistic rights regarding the use of English and French languages in legislative and judicial proceedings in Quebec and the federal jurisdiction. Besides these provisions the other restrictive provisions are contained in Section 20 - ensuring an annual session of Parliament, Sections 51, 51A and 52 - representation of population and Section 99 - guaranteeing the tenure of superior court judges. Apart from these restrictions, the provincial legislature and the federal parliament, within their jurisdiction as outlined in the B.N.A. Act, were deemed to have unlimited power.

B. Implied Bill of Rights - Pre 1960 Period

Although the courts have acknowledged the supremacy of the legislature and the Canadian Bill of Rights was enacted only in 1960, they have at times acted to invalidate legislations which purported to encroach upon the civil liberties of the citizens. However, as the powers of the judiciary in Canada are limited, in all such cases the impugned statute or regulation was declared void not exclusively on the ground that it infringed individual rights of the citizen or the group but becuase it was beyond the jurisdictional competence of the legislature which enacted it. Nevertheless, some of the judges, drawing authority from the preamble to the B.N.A. Act have declared the impugned enactments invalid also on the ground that they transgressed some of the basic rights of the citizens which are essential for healthy functioning of parliamentary democracy in a state. In the following paragraphs some such decisions have been reviewed. They would indicate the judicial approach towards civil liberties during a period when there was no express guarantee of any fundamental rights in this country.

In one of such cases (Re: Alberta Statutes - 1938)[15] the court was invited to test the validity of three Bills passed by the Alberta Legislative Assembly in 1937 and which were a part of a general scheme of legislation, the basis of which was the Alberta Social Credit Act. One of the Bills was entitled "An Act to ensure the Publication of Accurate News and Information" and sought to impose two mandatory obligations on the newspapers published from the province. In the first place the newspapers were to publish whatever news item or statements given to them by the chairman constituted under the Alberta Social Credit Act, and secondly, the chairman acting under the powers conferred by Section 4 of the Bill could force the newspapers to divulge the source of information of a particular news item published by the newspaper and the names and addresses of the persons associated with it. As the Bill had presupposed, as a condition of its operation, that the Alberta Social Credit Act had been validly enacted but the Court had declared it *ultra-vires*, the court held that the "dependent and ancillary legislation must fall with it". Although it was sufficient to dispose of the questions referred to their lordships, Duff CJ., with whom Davis J. agreed made some further observations on the nature of the Bill and remarked:[16]

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15. (1938) S.C.R. 100.

16. Ibid., at p 133.

> The preamble of the statute (the B.N.A. Act) moreover, shows plainly enough that the Constitution of the Dominion is to be similar in principle to that of the United Kingdom. The Statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from free public discussion of affairs, from criticism and answer and counter criticism, from attack upon policy and administration and defence and counter attack: from the freest and fullest analysis and examination from every point of view of political proposals.

and to impose any restrictions on free flow of information would amount to what his Lordship described as taking away "the breath of life for Parliamentary institutions".[17] Cannon J., who delivered a separate judgement emphasized the fundamental nature of free expression and said:[18]

> Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concering matters of public interest. There must be untrammelled publication of news and political opinions of the political parties contending for ascendancy. ... Democracy cannot be maintained without its foundations: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the criminal code and the common law.

In Samuar v. City of Quebec,[19] the Supreme Court of Canada invalidated a by-law prohibiting the distribution of any written literature in the city of Quebec without the prior approval of the City Police on the ground that it was beyond the jurisdictional competence of the provincial legislature to legislate on the matters concerning censorship and religion. Although the court (5;4) decided the issue on the ground of jurisdiction, Rand J., elaborated the freedom of speech aspect of the case and said:[20]

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[17] Ibid.

[18] Ibid., at pp 145-146.

[19] (1953) 2 S.C.R. 299.

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.

Similarly, in the case of Switzman v. Elbling,[21] the validity of the Communistic Propoganda Act which made it illegal to use a house for the propogation of Communism or Bolshevism, was challenged. The Supreme Court of Canada distinguishing an earlier decision of Bedard v. Dawson[22] held that the impugned legislation was with respect to criminal law and thus beyond the legislative competence of the Province of Quebec. Abbott J., however, weighed other considerations also and remarked[23]

> The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and whether they be social, economic or political are essential to the working of parliamentary democracy such as ours.

and went on to assert that not even Parliament, much less a provincial legislature, could abrogate such a right.[24] Support for this viewpoint can be found in the judgement of Rand J., with whom Kellock J. concurred.

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[20] Ibid., at p 329.

[21] (1957) S.C.R. 285 also known as the "Padlock" case.

[22] (1923) S.C.R. 681.

[23] Supra, n. 21, p 326.

[24] Ibid., at p 328.

Another case decided before 1960 and which deserves a special mention is that of Roncarelli v. Duplessis.[25] In this case the answerability of the executive for its acts done without legal justification was strikingly illustrated. Roncarelli was proprietor of a restaurant in Montreal who, as a Jehovah's Witness himself had acted as bondsman for a large number of his co-religionists. When his licence was cancelled in 1946, Roncarelli brought an action against the Premier, Maurice Duplessis on the ground that his licence was cancelled at the instigation of the Premier who had ordered the cancellation as Premier and as Attorney General of the Province. The trial judge allowed the claim, the court of Appeal dismissed the action and finally the Supreme Court decided (5:3) in favour of the plaintiff and awarded him damages of $25,000.

The majority held that the Premier had acted in a private capacity and not in the exercise of any of his official powers. There was no legal basis for it and no statutory justification for it. In the course of his judgement Rand J. asserted that the act of the Premier was "a gross abuse of legal power". His Lordship further held:[26]

> That, in presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our Constitutional Structure.

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[25] (1959) S.C.R. 121.

[26] Ibid., at p 142.

This case is perhaps the most striking of the Supreme Court decisions which uphold the "rule of law" in Canada and in turn the basic postulate of the Bill of Rights.[27]

Besides the cases briefly referred to above, there have been other cases namely, Birks and Sons (Montreal) Ltd. v. City of Montreal,[28] Winner v. S.M.T. (Eastern) Ltd.,[29] Re Drummond and Wren[30] and Nobel and Wolf v. Alley[31] where the courts have protected individual's right concerning freedom of religion and citizenship. In Re Drummond, the Court citing international charters such as the Atlantic Charter and the United Nations' Charter and referring to the statements of contemporary world leaders, declared a racially-restrictive covenant[32] as opposed to public policy and consequently void. Similar issue was before the Courts in the Nobel's case where the covenant was declared void because of the uncertainty. But in none of these cases the courts recognized infringement of civil liberties as an independent and sufficient constitutional doctrine to invalidate an Act, Regulation or by-law. However, the judges on occasion did lay emphasis on the civil

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27. Tarnopolsky, W.S., The Canadian Bill of Rights, (1975), p 122.

28. (1955) S.C.R. 799.

29. (1951) S.C.R. 887.

30. (1945) O.R. 778 (H.C.

31. (1951) S.C.R. 64.

32. The covenent in question forbade the buyer of a land to re-sell it to "Jews, or to persons of objectionable nationality".

libertarian aspects of case and Abbot J.'s dictum in the Switzman's case[33] is still regarded as the strongest support which ever came from the bench for the cause of civil liberties in Canada.

Thus as the judicial pronouncement outlined above indicates, even before the enactment of the Canadian Bill of Rights in 1960, the Courts of Canada did protect individual's basic rights on the basis of "Implied Bill of Rights" doctrine.[34] The enactment of a Bill of Rights has given a formal shape to individuals' rights and freedoms. But whether this enactment has been able to accomplish its ideals is questionable and requires an analysis of its effectiveness. However, a brief legislative history of the Canadian Bill of Rights would not be out of place before its effectiveness is discussed.

C. Legislative History of the Canadian Bill of Rights

After World War II, noticeable interest in, and concern for the protection of certain human rights and fundamental freedoms began to increase in Canada. This increased concern can be attributed to the world wide interest in these values.[35] The adoption of the draft international declaration and covenant on human rights by the Commission on Human Rights of the United Nations was the starting point for the Canadian Bill of Rights.[36] The other factors which were instrumental in moving Canada towards a formal enactment guaranteeing the basic rights were the deportation of Japanese Canadians from the West Coast and the arrest of a Soviet spy and his trial because these two incidents, to an extent, exposed the myth that individual rights and freedoms are adequately protected under the Canadian system.[37]

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[33] Supra, n. 21.

[34] See Brewin, F.A., A Bill of Rights Implicit in the B.N.A. Act, (1957), 35 Can. Bar Rv., p 557. However the "Implied Bill of Rights" theory never got support from the majority of the members of the court and has mostly been invoked as a subsidiary argument in the opinion of the judges who adopted it. (See Ybema S.P., Constitutionalism and Civil Liberties, (1973), p 200). Also see Schmeiser, D.A., The Effective Realization of Civil and Political Rights in Canada, 1968, 33 Saskatchewan Law Review, p 180.

[35] Tarnopolosky, Supra, n. 27, p 43.

In the federal Parliament the issue was first raised in 1945 and on May 26, 1947, the House of Commons adopted a resolution setting up a special joint committee of the Senate and the House of Commons on human rights and fundamental freedoms. The report of this committee was inconclusive, but advised against adoption of a Bill of Rights, whether federally enacted or by amendment of the Constitution.[38] In 1950, the Senate committee on human rights and fundamental freedoms (the Roebuck committee) reported the advisability of a Bill of Rights. It recommended that because of the Constitutional difficulties, the entrenchment of the Bill of Rights is unlikely, a federal Bill should be provisionally enacted.[39]

However, it was not until September, 1960, when Bill C-60 for "the recognition and protection of human rights and fundamental freedoms" was introduced in the Parliament by Mr. John G. Diefenbaker, former Prime Minister. Mr. Diefenbaker first raised the issue in Parliament in 1945 and then as leader of the Progressive Conservative Party in the elections of 1950, he promised the introduction of such a Bill, if elected. The Bill C-60 was withdrawn after the first reading to give individuals and groups a chance to study its implications. It was reintroduced as Bill C-79 for second reading. At the end of the debate, a House of Commons special committee was set up to study the Bill and receive representations on it.

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[36] See special editorial, (1948), 26 Can. Bar Rev., p 702.

[37] See Tarnopolosky, Supra, n. 27, p 4.

[38] H.D. Diabates (Can.) May 16, 1947, and 26, 1947, pp 3184, 246 and 3478.

[39] Tarnopolosky, Supra, n. 27, pp 12-14.

Following the report of the Committee, which suggested some changes, Bill C-79 was given an unanimous third reading on August 4, 1960. Next day it was passed by the Senate and received the Royal Assent on August 10, 1960.

D. The Actual Provisions

In a high sounding preamble, the Parliament expresses its desire to enshrine the fundamental freedoms and human rights in a Canadian Bill of Rights "which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada". Part I of the Act contains the Bill of Rights. Sections 1 and 2 read as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

   (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so contrued and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-incrimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to the law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person to the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

A "Law of Canada" in s. 2 is defined by s. 5 (2) as:

> (2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Section 5(3) lays down that the Bill is limited in its application to matters coming within the legislative authority of the Parliament and section 3 imposes the duty upon the Minister of Justice to examine every proposed regulation submitted in draft form to the Privy Council and every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and the provisions of Bill of Rights. He has to report any such inconsistency to the House of Commons.

Section 5(1) protects those human rights and fundamental freedoms which have not been enumerated in Part I and Section 6 which repealed the War Measures Act and replaced it with a new Section, suspends the Bill of Rights when the War Measures Act is in operation.

E. Effectiveness of Canadian Bill of Rights

As indicated by the provisions of the Canadian Bill of Rights referred to above, it is an ordinary piece of legislation operative on a federal level and without effect on provincial legislatures despite the fact that in respect of some of the matters covered by the Bill there is a good ground to contend that Parliament could bind the provincial legislatures.[40]

Even at the federal level, it does not have an overriding effect on the enactments of the Parliament. Since the Bill has no amending or repealing effect on the statutes which abrogates or infringes any of the rights guaranteed, it only lays down a rule of statutory construction and nothing more. The protection of civil liberties, however, require something "more than a mere enunciation of a rule judicial interpretation".[41] Furthermore, the effectiveness of the Bill of Rights is undermined by the fact that as an obvious corollary of the doctrine of sovereignty of Parliament, Canadian Parliament cannot bind the future legislature as to the substance nor as to the form of subsequent legislation. It cannot leave a mandatory direction for subsequent Parliaments not to enact any law which violates or abridges the freedoms and the rights guaranteed by the Bill.

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[40] Laskin, Canadian Constitutional Law, (1975), p 90.

[41] Laskin, Canada's Bill of Rights: A Dilemma for the Courts? (1962), 11 International and Comparative Law Quarterly, p 519 at pp 528-529. See remarks to the same effect in Laskin, An Inquiry into the Diefenbaker Bill of Rights, (1959), 37 Can. Bar Rev., p 32.

Thus, the Canadian Bill of Rights is nothing more than a mere declaratory statute. The only check Parliament has put on itself, is enforceable by Section 3: the Minister of Justice, in his capacity of watchdog examining every proposed regulation and every Bill for consistency with the purposes and provisions of the Bill.

However, the presence of the non-obstanate clause in the opening paragraph of Section 2 suggests that the Bill of Rights implies more than a mere canon of statutory construction.[42] The opening clause imposes the duty upon the courts to construe and apply every law of Canada so as not to abrogate or abridge any of the rights and freedoms recognized and declared by the Bill. Thus, the non-obstanate clause is a requirement for validity of existing and future legislation. If no meaningful construction can be given to a statute without violation of the Bill of Rights, the Courts must refuse to apply the statute.[43] Should such a statute prevail, the non-obstanate clause would be without sense and Parliament could impliedly amend to repeal the Bill of Rights. Consequently it can be said that the Bill has not merely a "high educational value"[44] nor has "no greater value than its operation as a political charter",[45] but imposes upon the courts the power of supervising legislation of Parliament in view of the Bill, while the Parliament itself retains the overriding power through the words of Section 2. Nevertheless, at this juncture it is only fair to admit that this approach is rather sketchy because the Bill does not indicate if the federal statute which is not in conformity with it would be pro-tanto repealed or declared inoperative. The courts have also not been confered with an explicit power to take any such action. To this if the institutional impedement created by the doctrine of parliamentary sovereignty is added, the statues of Canadian Bill of Rights is reduced to that of an ordinary Act, Regulation or by-law although it is supposedly there to protect basic rights and freedoms of human beings which are prerequisites for a civilized democratic society.

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[42] This view is represented by Rand, Except by Due Process of Law, (1961), 2 Osgoode Hall Law Journal, p 171; Burton, The Canadian Bill of Rights: Some American Observations, (1961-62), 8 Mcgill Law Journal, p 106. See also Tarnopolosky, Supra, n. 27, pp 128-163.

[43] But whether the statute would be pro-tanto repealed or declared inoperative is not clear.

[44] Lederman, W.R., The Nature and Problems of a Bill of Rights, (1959), 37 Can. Bar Rev., p 14.

F. Supreme Court and Bill of Rights

The effectiveness of the Canadian Bill of Rights can also be gauged by reviewing the decisions handed out by the Supreme Court of Canada since 1960 which involved civil libertarian issues and which were directly or indirectly connected with the Bill of Rights. The conclusion which emerges out is not very encouraging. According to Prof. Dale Gibson,[46] while the Court had upheld libertarian claims in 94% of the cases heard in the previous decade, it did so in only 24% of the 1960's cases. This is an alarming rate of decline keeping in view that Canada during the 60's had a formal statute to protect the individual freedoms and human rights.

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[45] Laskin, Supra, n. 41, p 134.

[46] Gibson, Dale, Supreme Court and Constitutional Law in the Sixties, (1975), 53 Can. Bar Rev., pp 629-630.

Prof. Gibson substantiates his statistics by stating that[47]

> the Supreme Court was very unsympathetic to civil liberties claims during the 1960's. Arguments based on the newly enacted Canadian Bill of Rights were rejected in six out of seven cases,[48] and even in the seventh case[49] the Bill of Rights was peripheral to the main issues involved. Special recognition for native hunting rights was denied in four out of five cases,[50] and arbitrary deportation procedures were upheld in two out of three cases.[51] The federal Lord's Day Act was held not to contravene the Canadian Bill of Rights with respect to adherents of non-Christian religions.[52] The news media were denied the right to invoke the defence of privilege in defamation proceedings, on the ground that they have a "right" to publish news and comment, they have no "duty" to do so.[53] And a federal radio licensing statute was interpreted to apply retroactively.[54]

Perhaps a significant omission from the cases listed above is the case of Regina v. Gonzales.[55] It was in this case that the Supreme Court while dealing with section 94(a) of the Indian Act *vis-a-vis* the Bill of Rights held that section 2 of the Bill merely stated a rule of construction. This interpretation of section 2 was to figure in many a judgement delivered by the Supreme Court in the years to come.

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[47] Ibid., at pp 629-631.

[48] Yuet Sun v. R., (1961) S.C.R. 70; Rebrin v. Bird, et al., (1963) S.C.R. 651; Guay v. La Fleur, (1965) S.C.R. 12; R. v. Randolph, (1966) S.C.R 260; O'Connor v. R., (1966) S.C.R. 619.

[49] Violi v. Suptd. of Immigration, et al., (1965) S.C.R. 232.

[50] Sikyea v. R., (1964) S.C.R. 642; R. v. George, (1966) S.C.R. 267; Sigeareak v. R., (1966) S.C.R. 645; Daniels v. White, et al., (1968) S.C.R. 517.

[51] Yuet Sun v. R., Supra, n. 46; Rebrin v. Bird, et al., Supra, n. 51.

[52] Robertson and Rosentanni v. R., Supra, n. 46.

[53] Banks v. The Globe and Mail Ltd., et al., (1961) S.C.R. 474.

[54] Procureur General, Canada v. La Presse, (1967) S.C.R. 60.

[55] (1962) 37 C.R. 56.

Thus, in an era when the liberalism and civil rights militancy was on the increase, the Canadian judges chose to adopt a conservative attitude and handed out consistently pro-government decisions when citizens were in direct confrontation with the government on the issue of civil liberties. This attitude of the Canadian Courts when analyzed in the foreground of the Canadian Bill of Rights, which was present in the statute books at that time, speaks for itself as to how effective was the Bill in accomplishing its ideals.

The situation did not change drastically in the 70's although the decade began with the landmark decision of the Supreme Court handed out in Regina v. Drybones[56] which breathed a new life into the otherwise sterile Bill of Rights. For the first time the Court, in a majority decision (6:3), established the Canadian Bill of Rights as the ruling document for interpretation of federal statutes. The facts were that late in the evening of April 8, 1967, Joseph Drybones, an Indian, was discovered intoxicated on the floor of Old Stope Hotel in Yellowknife, N.W.T. After Drybones was fined for his conduct, the Territorial Court held that section 94(b) of the Indian Act was incompatible with "equality before the law provision" of the Canadian Bill of Rights. The Court of Appeal upheld the Territorial Court's verdict and so did the Supreme Court of Canada.

Speaking for the court, Ritchie J. declared that section 94(b) subjected persons of Indian race to a minimum fine of not less than $10 or to a term of imprisonment not exceeding three months, or both,

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56. (1970) S.C.R. 282.

for being intoxicated anywhere off a reserve, while non-Indians according to section 19(1) of the liquor ordinance, were subject to a penalty only when intoxicated in a "public place", with the maximum term of imprisonment being thirty days and no provision being made for minimum fine. In other words, the definition of the offence was more sweeping, and the fines imposable were greater for Indians than they were for whites or others who committed essentially the same offence. Ritchi J., concluded that:[57]

> an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

Accordingly, he held section 94(b) of the Indian Act inoperative as it contravened section 1(b) of the Bill of Rights. He also rejected the canon of statutory interpretation approach regarding the purpose of the Bill and accepted that the Courts have power to declare inoperative any legislation which infringes the guaranteed rights and freedoms. Mr. Justice Hall added to the majority judgement the observation that the position taken by the court in an earlier case was analogous to the U.S. Supreme Court decision in Plessy v. Ferguson[58] announcing the "separate but equal doctrine", which was rejected nearly sixty years later by the same court in Brown v. Board of Education.[59] Hall J., in the course of judgement elaborated as to how the basic philosophy in Brown and Drybones is the same and held that:[60]

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[57] Ibid., at p 297.

[58] (1896), 163 U.S. 137.

[59] (1953), 347 U.S. 483.

[60] Supra, n. 54, p 297.

> The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of human rights and fundamental freedoms set out in s. 1 in whatever way the discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or not.

Chief Justice Cartwright, in his dissent, however queried[61] whether it was

> ...the intention of Parliament to confer the power and impose the responsibility upon the courts of declaring inoperative any provision in a statute of Canada although expressed in clear and unequivocal terms, the meaning of which after calling in aid every rule of construction including that prescribed in s. 2 of the Bill is perfectly plain, if in the view of the Court it infringes any of the rights or freedoms declared by s. 1 of the Bill.

Thus, for the first time Canadian Bill of Rights achieved a degree of paramountcy in Drybones, a fact which was acknowledged in later decisions[62] of the Supreme Court.

Nevertheless, despite this achievement of "paramountcy" or "primacy" by the Canadian Bill of Rights in its tenth year of operation, there is every evidence that in the nine years since then the current majority of the Supreme Court is extremely reluctant to find that any legislation could be inconsistent with the Canadian Bill of Rights and on one occasion[63] when the court did find an administrative action inconsistent with the provisions of the Bill, it could not provide the remedy.[64]

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[61] Ibid., at p 287.

[62] See the judgements of Laskin J., (as he was then) in Curr v. The Queen, (1972) S.C.R. 889, 892 and Ritchie J., in Hogan v. The Queen (1975) 2 S.C.R. 574, 587.

[63] Hogan v. The Queen, Supra, n. 62.

There are only three cases, other than the Drybones[65] case, where a majority of the Supreme Court has applied the Canadian Bill of Rights so as to protect the civil liberties of an accused. In all of these, however, the Supreme Court was not compelled to hold that a law of Canada was inoperative, but rather was able to "construe and apply" in conformity with the Bill of Rights. In Lowry and Lepper v. The Queen[66] the Supreme Court held unanimously that when a Court of Appeal allows a Crown appeal from an acquittal of an accused, it must afford the accused every opportunity to be heard before passing sentence. The Court was of the opinion that this right was confirmed by the Canadian Bill of Rights, especially the fair hearing clause in paragraph 2(e) thereof. In another case,[67] the Court cancelled a deportation order because of non-compliance with the Immigration Act as well as because the prospective immigrant did not have the assistance of an interpreter as required by paragraph 2(g) of the Bill of Rights.

Similarly, in Brownridge v. The Queen,[68] the Court was concerned with subsection 223(2) (now subsection 235(2)) of the Criminal Code which provides for an offence for failing or refusing, without reasonable excuse, to comply with a police officer's request for a breath sample. In this case the accused had been arrested for impaired driving and, upon arrival at the police station, had requested an opportunity to speak with his lawyer. The police refused him this opportunity and he then refused to give a sample of his breath. Two hours later, after he had spoken to his lawyer, he offered a sample of his breath and this offer was refused. He was then charged under section 223(2).

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[64] Tarnopolsky, W.S., A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada, (1978) Special Lectures of the Law Society of Upper Canada, p 161, 169.

[65] Supra, n. 56.

[66] (1972), 26 D.L.R. (3d) 224.

[67] Leiba v. Minister of Manpower and Immigration (1972), 23 D.L.R. (3d) 476.

[68] (1972) S.C.R. 926.

By a majority of six to three, the Supreme Court held that the conviction should be quashed. On behalf of four of the majority judges, Mr. Justice Ritchie concluded:[69]

> ...it would run contrary to the provisions of (The Bill of Rights) to hold that denial to a man under arrest of the right to retain, and instruct counsel without delay was incapable of constituting a reasonable excuse for failing to comply with the demand under s. 223 of the Ciminal Code.

Besides the three cases referred to above, in all other cases before the Supreme Court of Canada, after the Drybones decision, although the majority has never detracted from the fundamental principle of the Drybones case, majorities have always been able, with one exception, to so "construe and apply" the laws in question as not to find a conflict with the Canadian Bill of Rights. The exception has been the case of Hogan v. The Queen,[70] which has been referred to as "one of the most unfortunate decisions of the Supreme Court of Canada in diminishing the possible effect of the Canadian Bill of Rights."[71] In this case also the accused man was denied the right to speak to his lawyer before taking a breathalyzer test. However, upon being told he would be charged with failing to take the test, he submitted whereupon he was charged with and convicted of driving with a blood alcohol level greater than .08, contrary to section 238 of the Criminal Code. At the trial, it was contended that this evidence was inadmissible because it was obtained in violation of subparagraph 2(c)(ii) of the Canadian Bill of Rights. However, the trial judge rejected the argument and the accused was convicted. His appeals all the way up to and including the Supreme Court of Canada were rejected.

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[69] Ibid., at p 937.

[70] Supra, n. 62.

The majority of the Supreme Court of Canada sustained the conviction essentially on the basis of Anglo-Canadian common law position relating to the admissibility of illegally obtained evidence. Ritchie J., speaking for the majority asserted, "whatever view may be taken of the Constitutional impact of the Bill of Rights," it did not necessarily mean that where there is a breach of one of the provisions of that Bill "it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the Common Law rule long accepted in this country".[72] Chief Justice Laskin (Spence J. concurring) in his dissent, characterized the Canadian Bill of Rights as a "quasi constitutional instrument" and remarked:[73]

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[71] 71. Supra, n. 62.

[72] 72. Supra, n. 62, p 584.

[73] 73. Ibid., at pp 589-590

> The present case does not involve this court in any reassessment of the principles underlying the admissibility of the illegally obtained evidence as they developed at common law. We have a statutory policy to administer, one which this court has properly recognized as giving primacy to the guarantees of the Canadian Bill of Rights by way of positive suppressive effect upon the operation and application of federal legislation: see the Queen v. Drybones. The result may be, as in Drybones, to render federal legislation inoperative or, as in Brownridge, federal legislation may become inapplicable in the particular situation while otherwise remaining operative.

It is submitted that the reasoning of Chief Justice Laskin is more realistic because "what primacy the Bill can really have in safeguarding the rights of the individual unless the sanction for an invasion of one of its guarantees is the exclusion of the evidence thereby obtained."[74]

In sum, it can be said that from the Supreme Court decisions involving Canadian Bill of Rights since its enactment in 1960, it is abundantly clear that neither the Bill has been able to accomplish the high ideals for which it was enacted nor the Courts have bestowed it with enough strength to do so by giving circumscriptive interpretation to its provisions. Leaving aside Drybones,[75] the Supreme Court has either read the provisions of the Bill of Rights as a mere rule of statutory construction or has indicated that its application is limited to the rights and freedoms which existed on the date the Bill came into force.[76] Hogan's case,[77] where the majority conceded that there has been an infringement of the Bill of Rights but failed to provide a remedy, clearly indicates as to how effective the present Canadian Bill of Rights has been. In order to insure greater protection for these rights and freedoms it is necessary to incorporate them in the B.N.A. Act itself; which is the theme of the discussion in the following pages.

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[74] Laskin, Supra, n. 40, p 900.30.

[75] Supra, n. 56.

[76] See Robertson and Rosetanni v. The Queen, (1963) S.C.R. 651 (Per Mr. Justice Ritchie); R. v. Burnshine (1975) I S.C.R. 693 (Per Mr. Justice Mortland); Regina v. Miller and Cockriell, (1976), 70 D.L.R. (3d) 324 (Per Mr. Justice Ritchie).

[77] Supra, n. 62.

III. WHY AN ENTRENCHED BILL OF RIGHTS

As discussed at the beginning of this chapter, fundamental rights are offsprings of natural law and natural rights and consequently they occupy a supremely eminent position in the hierarchy of rights. The value of these rights is enhanced in a democratic society where they deserve better protection than ordinary legal rights.

The Canadian Bill of Rights, no doubt, professes to protect and guarantee individual rights and freedoms, but besides being ineffective, it has other serious deficiencies too. Being an ordinary parliamentary legislation, it is subject to all the whims and fluctuations of changing political climate. By entrenching these rights in the Constitution, certain subjects will be withdrawn from the everyday political arena where their integrity might be threatened by changing political considerations.

In support of the underlying philosophy behind this argument it can be safely said that unless certain basic rights are established as limits of the majority of the people and the government, there is no guarantee in Canada that the essential rights of a minority will be protected against hostile majority. If the supremacy of Parliament is not circumscribed by an entrenched Bill of Rights, then a majority vote could impose any limits imaginable on the rights which are believed to be fundamental to the life and integrity of a democratic society. To say that in parliamentary democracy, politicians are accountable to the people and may thus be turned out of office for their disregard for the civil liberties is not an adequate answer to such a possibility. Elections are, after all, an exercise in discovering the will of the majority. If a majority of electorate approve the infringements of the rights of the minority, what recourse is open to the minority for protection? It is submitted that fundamental rights are not, and never have been, dependent on majority votes, election results, or other political considerations. They form the core of a democratic society and are essential for civilized way of life. Nothing less than their entrenchment would guarantee that they are not tampered with.

Another deficiency, from which the present Bill of Rights suffers is that it is limited in its application only to the federal jurisdiction. It does not affect matters within the authority of the provinces or the municipalities. There is no constitutional sanction against the provincial legislatures and the local bodies to encroach the fundamental rights of the citizens. An entrenched Bill of Rights would be limiting the provincial legislative competence as well and would provide access to the aggrieved party to challenge provincial government's action in a Court of Law. Commenting on the present status of fundamental rights *vis-a-vis* the provincial legislative or executive action, British Columbia Civil Liberties Association has observed.[78]

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[78] An Entrenched Bill of Rights: Position Paper, British Columbia Civil Liberties Association, (1973), p 3.

> The legal problems involved for such a person under our current situation are such that many citizens are discouraged from asserting their rights, and acquiesce out of futility as their freedoms are gradually eroded by governmental action.

Furthermore, as the division of power between federal and provincial legislatures under the B.N.A. Act is quite rigid, authority to legislate with respect to some of the rights regarded as fundamental lies with the provinces, while authority to legislate with respect to others lies with Parliament. By entrenching the fundamental rights in the Constituion, certain common rights and freedoms would be guaranteed to all Canadians irrespective of the federal-provincial jurisdictional considerations.

Similarly, another important advantage of having fundamental rights enshrined in the Constitution is that the role of only organ of the state--the judiciary, which is above extraneous considerations, becomes enlarged and vastly more important. An obvious corollory to entrenched individual rights is the extensive power of judicial review given to the courts. This means, in effect, that the courts would have the power to review both legislation and legislatively authorized actions to see whether or not they comply with the Constitution of the country, and if not than to declare such acts as *ultra vires* of the Constitution. Furthermore, judicial review gives the courts the power to check tides of opinion which may have swept legislators into making hasty, ill considered laws infringing on basic freedoms. It is this enhanced relevance of the judiciary, affecting the everyday life of the country, that draws fire from those who believe legislative supremacy is the end-all and be-all of the Canadian system of government. However- it is submitted that this argument lacks merit and has been dealt with in greater detail in the next part.

On international level too, the concern for protecting human rights is ever increasing and is now an international doctrine of the United Nations. The instruments which have been adopted by the United Nations, in themselves make out a strong case for greater protection of human rights throughout the world. Canada being a signatory, supports the ideal and is obliged to comply with the various international charters on human rights. But if Canada as a matter of policy advocates the strengthening of these values on the international level, it can surely guarantee the protection of basic human rights in the Constitution. The entrenchment of the individual rights in the Constitution of Canada will not only insure greater protection within the country, but would also provide an impetus to the international momentum.

A. The Opposition

Although, over the years, various reasons have been advanced in opposition to an entrenched Bill of Rights, the major concern of such advocates has been the increased power of the judiciary. They feel that the courts, through the power of judicial review, rather than Parliament will have the final word on the basic policy issues, thereby undermining the whole concept of the parliamentary sovereignty.

This contention, however, is not completely true because neither an entrenched Bill of Rights nor the power of judicial review entirely removes constitutional matters from legislative scrutiny and revision. The power to amend the Constitution is real and useable power and can only be exercised by legislatures. By virtue of this power, Parliament can amend the Constitution through a definite "manner and form" laid down in the Constitution. No doubt, an entrenched Bill of Rights and the power of judicial review gives a certain degree of stability and strength to the fundamental rights protected under their powers, but these rights are not made absolute and are not untouchable. In the larger interest of the people, Parliament can amend the Constitution whenever it deems it is necessary. Obviously, the "manner and form" for amending the Constitution would provide safeguard to insure that any change contemplated by Parliament would receive careful scrutiny, discussion and substantial support.

In the same vein, it is incorrect to say that the courts would have the final word on governmental policy matters. The courts never formulate policies. They only examine if a particular policy violates or infringes the rights guaranteed by the Constitution or any other provision thereof. If it does, they strike it down, thereby insuring that no policy of the government is above the basic rights of the individual and the written provisions of the Constitution. And the courts have all along since 1867 exercised this power while deciding disputed questions regarding jurisdiction.

In sum, it can be said that an entrenched Bill of Rights would neither undermine the concept of the sovereignty of Parliament, as understood and practiced in Canada[79] nor would it make the whole constitutional framework extremely rigid because power to amend the Constitution in a prescribed "manner and form" shall always rest in Parliament. The entrenched Bill of Rights would serve as a statement of values to be understood and protected by all people and would provide a new direction towards an acknowledged goal. In a country where separatist tendencies have a long history, entrenched Bill of Rights would also help in providing a unifying effect.

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[79] For detailed discussion on parliamentary sovereignty and the entrenchment question see Tarnopolsky, Supra, n. 27, pp 92-112.

B. Official Position on Entrenchment

Even at the time when the Canadian Bill of Rights was being enacted as an ordinary parliamentary statute, there was considerable support for enacting it as an amendment to the B.N.A. Act. However, it was only in 1967 that the Liberal Government in Ottawa made a concentrated attempt towards an entrenched Bill of Rights. Possibly because "in some seven years after the adoption of the Canadian Bill of Rights, there appeared to be some waning of interest in the body politic in the Bill, and some considerable cynicism among the legal profession as to its effectiveness."[80] On February 1, 1968, Mr. P.E. Trudeau, the then Minister of Justice tabled in the House of Commons a White Paper on a Canadian charter of human rights.[81] During the same week, the charter was presented to the provincial premiers at the first constitutional conference with a view to obtain their support.

C. Contents of Entrenched Bill of Rights

The White Paper consisted of four chapters. In the first two chapters, a strong case was made out as to why Canada should have an entrenched Bill of Rights. Chapter III of the White Paper spelled out the possible contents of the charter of human rights. It suggested that an 'expanded' version of the Canadian Bill of Rights, which would ensure protection of all the five broad categories of fundamental freedoms,

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80. Ibid., p 14.

81 Trudeau, P.E., A Canadian Charter of Human Rights, (1968).

namely, political, legal, egalitarian, linguistic and economic, should be entrenched in the Constitution. A strong case was made out for the incorporation of the American "due process" clause while guaranteeing protection of "life" and "personal liberty". Provision was made in the charter that the existing civil liberties guaranteed by the present Bill of Rights shall be recognized and the right against unreasonable search and seizures and retroactive penal legislation will be added. Similarly, it proposed the extended application of the anti-discrimination provisions so as to apply to private conducts as well as the federal and provincial governments. It further suggested that the right against discrimination should also be made available in the field of employment, right and enjoyment of personal property and other facilities and services. Inclusion of linguistic right as a fundamental right was strongly stressed and perhaps rightly so, but the economic civil liberties were not proposed for inclusion in the charter. Nevertheless, the government did acknowledge it (economic civil liberties) as the "ultimate objective for Canada", but weighing other considerations it asserted that there were "good reasons for putting aside this issue at this stage".[82]

Thus, the Canadian charter of human rights, for the first time, provided the blueprint of constitutionally entrenched fundamental rights for Canada. Parliamentary sub-committees were then appointed to study the whole issue in greater detail. These committees, after considerable deliberations put forward their proposals. These proposals along with others were incorporated first in the federal government's White Paper on the Constitution and the people in Canada[83] and then in the exhaustive constitutional charter agreed upon by the federal and provincial governments in the conference held in June, 1971, in Victoria. Part I of the constitutional charter dealt with political rights (including minorities' right to language) in a fairly thorough manner. It provided for the first time carefully worded draft Articles guaranteeing rights and freedoms to the citizens. It also provided for an entrenched Supreme Court and a right of judicial review[84] and made adequate arrangement to remove regional disparities.[85]

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[82] Ibid., p 27.

[83] The Constitution and People of Canada (1969). See especially pp 50-62.

However, despite the apparent agreement at Victoria, Quebec chose to back out as the matter of jurisdiction over social walfare was not agreed upon. Nevertheless, the process which started with the White Paper on Canadian charter of human rights did not end with the rejection of constitutional charter by Quebec. The issue of entrenchment of the Bill of Rights, within the broader issue of constitutional revision, became a topical one. Numerous committees, both within and outside the government, since then have studied and analyzed the whole issue to its minutest details and have come out with valuable suggestions. The special joint committee of the Senate and the House of Commons,[86] for instance, besides endorsing the Victoria Charter, suggested that there should be a provision requiring "fair and equitable representation in the House of Commons and in the provincial legislatures". It also recommended including guarantee that "right to citizenship, once legally acquired should be made inalienable".

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[84] Part IV; Article 35.

[85] Part VII; Article 46.

[86] Also known as Molgat - MacGuigan Committee.

Similarly, the Canadian Bar Association, in 1973, for the first time adopted the resolutions recommending that:[87]

> in order to enhance the rights of persons the legislative powers of the State be limited and in particular the legislatures of Canada be encouraged to adopt Bills of Rights protecting against abuse of legislative and administrative power.

The growing concern for more protection of civil liberties and human rights, in the 70's, prompted the government of Alberta to enact a Bill of Rights in 1972.[88] In addition, the federal and provincial governments all now have on their statute books laws which proscribe discriminatory practices in broad range of social and economic activities. Nevertheless, besides suffering from the same institutional deficiencies which are found in the Canadian Bill of Rights, most of these enactments lay emphasis only on anti-discriminatory provisions. No doubt, equality of treatment is an integral and important part of the fundamental rights in general, but not the only one. It is submitted that nothing less than entrenched Bill of Rights can provide comprehensive and effective protection of the fundamental rights.

D. Constitutional Amendment Bill, 1978 and the Fundamental Rights

The momentum towards entrenchment and federal government's commitment to it resulted in its being one of the two major considerations of the comprehensive Constitutional Amendment Bill (C-60) which was tabled in the House of Commons in 1978. The Bill was part of the process that would "lead to a new and wholly Canadian statement of Canada's Constitution"[89] and federal government's White Paper, "A Time For Action" elaborated the underlying reasons for such a renewal. It stated:[90]

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[87] Canadian Bar Bulletin, September 1973, quoted by Tarnopolsky, Supra, n. 27, p 22.

[88] R.S.A. 1972, c.1.

> The government sets only two conditions for the renewal of the constitution.
>
> The first that Canada continue to be a genuine federation...
>
> The second that a Charter of basic rights and freedoms be included in the new constitution and that it apply to both orders of government.

Part III of the Constitutional Amendment Bill, which dealt with the Charter of Rights and Freedoms, indicated that the following rights deserve protection:

- political and democratic rights and freedoms
- individual legal rights
- freedom of movement of citizens
- egalitarian or anti-discrimination rights
- rights respecting the French and English languages
- other subsisting rights and freedoms.

The Bill went on to specify as to what rights should be protected under the changed Constitution. It acknowledged that the American interpretation of the "due process" clause should be incorporated while the right of "life" and "personal liberty" is being guaranteed. However, it was thought that "due process" clause should not be made applicable when right of use and enjoyment of personal property is deprived by a state action. Explaining the rationale, and which has complete endorsement of the author, the government stated:[91]

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89. The Constitutional Amendment Bill,(1978), p iii.

90. Trudeau, P.E., A Time for Action, (1978) pp 21-22.

91. Canadian Charter of Rights and Freedoms: Constitutional Reform, (1978), p 7.

> The reason for this change is that the right to property need not be viewed as inviolable as the right to life, liberty and security of the person. If at the same point the Canadian Courts were to adopt what has at times been the approach of the United States Courts to the protection of property rights under the "due process" clause, we would be faced with a situation where the rather than the legislatures were deciding not only what is just compensation but also what property takings are in public interest.

The Bill instead suggested that State could deprive a person of property rights "in accordance with the law" rather than by "due process of the law".

Right of movement and right to hold property in any part of the country was guaranteed by section 8 of the Bill. However, this right was made available only to Canadian citizens because the government felt that such rights are "viewed as essential attributes of that status".

The Bill contained elaborate provisions for the protection of language rights of individuals,[92] of groups and of the collective society. Regarding official language of the country, the Bill provided that Parliament and the provincial legislatures could declare French and English to be the official languages of the country for all purposes that the legislative bodies deem appropriate. Nevertheless, it made it clear that an individual has a right to use English or French in any debates or proceedings in any legislature or territorial council. Similarly, it was made obligatory for the Parliament as well as the legislatures of Ontario, Quebec and New Brunswick to publish all its statutes, records and journals both in English and French. Provision was made for use of English and French languages in courts at the federal level and in Ontario, Quebec and New Brunswick at the provincial level. However, an individual giving evidence in any court, in criminal proceedings under federal law and in penal proceedings under provincial law where loss of liberty is the penalty was permitted to address the court either in English or French. Communication with institutions of government could also be done in English and French.

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[92] Ibid.

Regarding the medium of instruction of the school children, the Bill provided that the parents, who spoke the minority language in a province (as between English and French) could choose in which of those languages they wished to have their children educated in publicly funded schools. However, consent of the province was made necessary before the aforesaid provision could be brought into effect. The same section[93] then elaborated the manner in which the parents could make the choice and under what circumstances any minority language speaking parents, who are citizens, would have the right to have their children educated in their language in public schools. Nevertheless, no one could be forced to attend a minority language school and provincial authorities could ask any student in a minority language school to be given instructions in the use of majority language as a part of his schooling. It was acknowledged that preservation of English and French is vital to the future of Canada.

In brief the comprehensive Constitutional Amendment Bill proposed the protection of the following rights and freedoms:

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[93] Section 21.

- fundamental political rights and freedoms
- individual legal rights
- right of free movement
- rights respecting non-discrimination
- right to vote and hold elective office
- language rights in legislatures
- language rights in courts
- language rights respecting government services
- language rights respecting education.

The Bill made provision for the following collective rights and freedoms:

- duration of legislative bodies
- annual session of legislative bodies
- language of statutes, journals and records
- preservation of French and English languages.

E. Enforcement of Individual Rights and Freedoms

A declaration of fundamental rights is meaningless unless there are effective judicial remedies for enforcement. That is why Article 8 of the Universal Declaration of Human Rights places the right to an "effective remedy ... for violating the fundamental rights" as an independent right. Generally the mode of enforcement of these rights is through high 'prerogative writs' in the nature of *habeas corpus*, *mandamus*, prohibition, quo-warranto and *certiorari* which form the bulwark of individual liberty in England. Similarly, under the Constitution of the United States of America, although no specific provision is made for the issue of these writs, it is assumed that these writs would be available under that system also.[94] This is indicated by the fact that there is specific provision guaranteeing against the suspension of the writ of habeas corpus[95] and the Jurisdictional Act, 1925, lays down the conditions and procedure for the issue of these writs.

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[94] See Shapiro and Tresolini, American Constitutional Law, 4th Ed., (1975), pp 165-177.

In a similar vein, the Constitutional Amendment Bill contains provisions whereby courts have been expressly directed to strike down any law which violates any of the individual rights and freedoms, save to the extent that the law may be found to constitute a justifiable limitation on the exercise or enjoyment of an individual right. To reinforce this measure of protection, the Bill made provision for an individual to make application to the courts to have such rights determined and enforced, and the courts would have power to determine if any limitation on a right was justifiable.[96] Thus, adequate provisions have been made in the Bill to ensure that the funadmental rights are effectively protected.

F. Limitations on Individual Rights and Freedoms

Absolute or unrestricted individual rights do not and cannot exist in any modern state. Since the disappearance of the fetish of *laissez faire* and the emergence of the welfare state, it is generally acknowledged that the individual can have no absolute or unfettered right in any matter and that the welfare of the individual, as a member of a collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs. There is no protection of the rights themselves, unless there is a measure of control and regulation of the rights of each individual in the interests of all.

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[95] Section 9 of Article I.

[96] See Sections 23,24 of Constitutional Amendment Bill. Also see Canadian Charter of Rights and Freedoms: Constitutional Reform (1978), Supra, n. 91, pp 3, 15.

In the United States, although the Constitution places no limitations upon any of the fundamental rights enshrined in it, the courts in the interest of society in general, have invented the doctrine of 'Police Power' of the state, under which the states have the inherent power to impose such restrictions upon the fundamental rights as are necessary to protect the common good, i.e., the public health, safety and morals. Elaborating the point, American Supreme Court has held that:[97]

> The liberty of the individual to do as he pleases even in innocent matters, is not absolute. It must frequently yield to common good.

Explaining the rationale behind the police power, the U. S. Supreme Court had held in another case that:[98]

> the whole is greater than the sum total of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state shall suffer.

However, in later decisions this power of the states has been extended by the Courts so as to secure "general convenience, prosperity and welfare" and not just public health, safety and morals.[99]

The Canadian Constitutional Amendment Bill in similar fashion permits such limitations upon the individual rights and freedoms which are "justifiable in a free and democratic society" and are in the interest of

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[97] Adkins v. Children's Hospital, (1923) 261 U.S. 525.

[98] Holden v. Hardey, (1896) 169 U.S. 336.

[99] Eubank v. Richmond, (1912) 266 U.S. 137. Kovacs v. Cooper, (1949), 336 U.S. 77.

- public safety or health
- the peace and security of the public
- the rights and freedoms of others.

No doubt, such a limiting provision would give the government the right to regulate the exercise of a fundamental right in order to prevent it from being abused, but whatever legislation is made in exercise of this power, would be subject to the scrutiny of the Courts for the verdict whether it is proper exercise of such a power or an abridgement of the fundamental rights itself.

Another related issue, which needs some consideration is whether or not there should be a constitutional provision whereby the federal government could assume overriding power during an emergency created by war, external aggression or insurrection. In the light of what has been detailed above and in the preceeding chapter, it is submitted that there is no need for Canada to have constitutionally entrenched provisions to counter a state of emergency. Any such emergency could be effectively dealt with by Parliament acting under its "war and defence" power supplemented by its power under the "peace, order and good government clause". Furthermore, as the Constitutional Amendment Bill permits that restrictions on the individual rights and freedoms could be imposed in the interest of 'security and the public', any limitations imposed on the fundamental rights of the people during such a state would be valid exercise of the power by the government. This would ensure that during a time of grave national crises such as war or external aggression, the efforts of the government to counter the crises would hold precedence over individual rights and freedoms. Nevertheless, it is submitted that in a country like Canada, it is not desirable to have insurrection--real or apprehended, as a ground of declaring a state of emergency.

Thus in Canada, stage is set for a comprehensive constitutional revision. And the new Constitution of Canada, as and when it emerges would definitely guarantee the protection of individual rights and freedoms. The special committee of the Canadian Bar Association on the Constitution, in its report published in 1978, has strongly recommended that there should be[100] "a clear statement in the Constitution of the fundamental values all Canadian share" and the opposition to constitutionally entrenched individual rights is on the decline.[101] The change of government at Ottawa in May this year has, however, slowed this process as the constitutional revision does not seem to be as high on the priority list with Mr. Clark as it was with Mr. Trudeau. However, it is sincerely hoped that in the years to come, the ruling party in power would give constitutional revision and the entrenchment question a serious thought as they are not merely an "academic exercise" but are essential prerequisits "to meet the aspirations and present-day needs of all Canadians".

IV. PROCEDURE FOR ENTRENCHMENT - THE AMENDING FORMULAE

After considering as to why Canada should have an entrenched Bill of Rights and what should be its contents, the possible means to accomplish the desired goal shall now be examined. It is submitted, that over the years the lack of agreement over an amending formula,

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100. The Canadian Bar Association's Committee on the Constitution, Towards a new Canada, (1978).

101. However, see The Report of the Alberta Advisory Committee on the Constitution (1978), p 11, for arguments against entrenchment.

more than anything else, has been the main impediment in any proposed constitutional reform which is long over-due in this country. As the B.N.A. Act does not have a self-contained amending formula for matters of fundamental importance, there has been a constant search for a procedure by which the Constitution of this country could be indigenously amended. Although since 1926, there have been nine attempts[102] to evolve an amending formula agreeable to all, the three which are considered of greatest relevance are the Fulton-Favreau formula of 1964, the Victoria amending formula of 1971 and the procedure suggested by Mr. Trudeau in the White Paper entitled "A Time For Action" which was made public immediately before the government came forward with the comprehensive Constitutional Amendment Bill in 1978. These have been considered in greater detail alongside some other relevant suggestions in the following paragraphs.

A. The Fulton-Favreau Formula

The Fulton-Favreau formula was drafted in the form of an Act in 1964 and, like previous proposals put forward at federal-provincial conferences, it was highly complex. All amendments of the Constitution would take the form of an Act of the Parliament of Canada, subject, in a wide range of matters, to the concurrence of provincial legislatures. The formula provided for unanimous consent for certain classes of subjects, including the entire range of the distribution of powers. Otherwise it provided for varying degrees of flexibility, depending upon the subject matter. It further restricted the power of the

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[102] For some details of these attempts see The Canadian Constitution and Constitution Amendment, (1978), pp 10-13.

Parliament of Canada to amend the Constitution under 91(1) by adding the following items to the excluded categories: the functions of the Queen and the Governor General; provincial representation in the Senate, the residence qualifications of Senators and the requirements for summoning; the right of a province to no fewer MP's than Senators; the principles of proportionate representation in the House of Commons; and the use of the English or French language. On the other hand, the Fulton-Favreau formula introduced a new kind of flexibility with the concept of the delegation of legislative authority. Although initially this amending formula got support from the Premiers but later on Quebec Premier Lesage withdrew its support and the consideration of the matter was postponed indefinitely.

B. The Victoria Amending Formula

Unlike the Fulton-Favreau formula, the Victoria amending formula was characterized by a relative degree of simplicity. It departed significantly from all previous proposals in that no amendment to the Constitution of Canada would require the unanimous consent of the provincial legislatures. Amendments to key areas of the Constitution, including the distribution of powers and matters excepted from the exclusive power of Parliament, could be made with the consent of Parliament and the consent of the legislatures of two Atlantic provinces, of Quebec, of Ontario and of two Western provinces representing at least fifty percent of the population of the Western provinces. Amendments applying to one or more, but not to all of the provinces could be made with the consent of Parliament and the legislatures involved. Amendments to the Constitution would take the form of a proclamation of the Governor General rather than of an Act of Parliament. Finally, provision was made for Parliament and the legislatures each to exercise certain exclusive powers of amendment. Thus, the Victoria amending formula abandoned the full rigidity of the specially protected elements of the Fulton-Favreau formula (unanimous concurrence of all provincial legislatures) and introduced the notion of regional protection (concurrence of the legislators of two Atlantic provinces, of Quebec, of Ontario and of two western provinces representing at least fifty percent of the population of the western provinces).

The Victoria amending formula met with the same fate of its predecessor. After an initial agreement in principles, the government of Quebec and Saskatchewan chose to withdraw. Later on in April, 1975, Prime Minister Trudeau proposed that early steps should be taken for the partriation of the Constitution on the basis of the amending formula agreed at Victoria. This again, as in the past, got a favourable initial response from the Premiers, but in October, 1976, Premier Lougheed of Alberta wrote to Prime Minister Trudeau indicating that although the more flexible Victoria amending formula was acceptable to eight of the premiers, he personally wished to return to the more rigid Furton-Favreau formula. This again, resulted in yet another stalemate.[103]

C. "Time For Action" and Renewed Search for Agreement

Perhaps disappointed at the slow pace of the progress in past, Prime Minister Trudeau in the White Paper entitled "A Time For Action" which was made public immediately before the government tabled the

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[103] Ibid., pp 12, 13.

Comprehensive Constitutional Amendment Bill in 1978, suggested that the Parliament could proceed unilaterally to make certain changes in the Constitution. Outlining the position, the Paper stated:[104]

> In examining ways of meeting this objective (of Constitutional reform), the government has been mindful of the considerable latitude which is given to Parliament by the present constitution to make changes in those parts which pertain to our central institutions of government, including the Senate or the Supreme Court. It is also quite possible for Parliament to include, along with such changes, provisions in a renewed constitution which would set out a Statement of Aims and a Charter of Rights and Freedoms to which Parliament would subscribe, and which would be applicable to all activities of Parliament and Federal Government thereafter. Provision could be made for provincial governments to join in supporting the Aims and Charter, at once or when they saw fit. (emphasis added)

The White Paper then suggested a time bound programme by dividing the whole process of constitutional reform into two phases. Phase one of the process, the Paper stated, should cover those substantial matters upon which Parliament can legislate on its own authority. Phase two of the process should cover those matters which require joint action by federal and provincial authorities especially relating to the distribution of power aspect of the reform.

Thus, without entering into the controversy whether or not Parliament can proceed unilaterally to change the Constitution and assuming that it can, it is suggested that Parliament should immediately proceed to implement the changes. If it does then Canada will very soon have a charter of rights and freedoms entrenched in its Constitution. Regarding a general amending formula, it is submitted that the formula suggested at Victoria in 1971 is best suited because it is reasonably rigid but at the same time more flexible than the Fulton-Favreau formula as it does not require unanimous concurrence of all provincial legislatures as well as the federal Parliament but stresses on the notion of regional protection. It, besides satisfying the basic requirements necessary for an amending procedure of a democratic constitution, is quite similar to amending formulae[105] found in various similarly moulded Constitutions. However, keeping in view regional and cultural disparities within Canada, the Victoria formula should be supplemented with a provision for popular referendum which could be used if one of the constituents essential for an amendment, takes an opposite view. Elaborating upon such a mechanism and on what occasion it could be used, the policy paper of the government on "The Canadian Constitution and Constitutional Amendment" has stated:[106]

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[104] TRudeau, Supra, n. 90, pp 24-25.

> (a) If a sufficient number of provincial legislatures approve a proposed amendment, so that all four regions are of one mind, and if the Parliament takes the opposite view, a national referendum could be held if the provinces so requested to ascertain the wishes of the majority of Canadians.
>
> (b) If three regions and Parliament favour an amendment but the fourth region is opposed as determined by the vote of legislature or legislatures concerned, a referendum could be held in the dissenting region to ascertain the wishes of Canadian in that region. A majority of those voting should decide the issue.

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105. See the provisions for the amendment of the Constitutions of the United States, Switzerland, Australia, Federal Republic of Germany and India. Supra, n. 102, pp 3-8.

106. Ibid., p 20.

The aforesaid procedural changes if coupled with the basic Victoria amending formula could make it somewhat easier to amend the Constitution by providing for more ways of having an amendment approved. With regard to the initiation of a constitutional amendment, it is suggested that such a measure could be initiated in any legislature and should be passed by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. The same criterion should be applied when the proposed amendment is being ratified by other legislatures.

Although most of the governmental efforts towards a comprehensive Constitutional revision inclusive of entrenched individual rights and freedoms outlined above, were initiated by the previous federal government, the present one, as and when it desires, can accomplish the desired goal within no time as every aspect of the matter has been thoroughly researched. However, as the whole issue involves policy decisions of the federal government and compromising attitude on the part of the provinces, it is difficult to say as to when Canada would have its own Constitution or entrenched individual rights and freedoms.

CHAPTER FOUR

I. CONCLUSION

The present study has two clear subdivisions: (i) analysis of emergency powers under the Indian and the Canadian constitutional systems and (ii) the entrenchment of individual rights and freedoms in the Canadian Constitution. Accordingly, in this Chapter, the conclusions and suggestions arising out of the research have been put forward separately.

A. Emergency Powers - Resumé

In times of grave national emergency, normal Constitutional principles may have to give way to the overriding need to deal with the emergency. In Lord Pearce's words, "the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings."[1] Under the British System, the Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency. The prerogative right of the Crown, while dealing with an apprehended emergency, extends to interfering with the right of the subjects.[2] The European Convention on Human Rights, permits a member state to take measures derogating from its obligations under the Convention "in time of war or other public emergency threatening the life of the nation".[3] The UK government has, in recent past, exercised the right of derogation in respect of events in Northern Ireland. Similarly under the Constitution of the United States, although there are no explicit provisions empowering the President or the Congress, to deal with an emergency, the President acting under ~~its~~ 'war powers' can take almost any action in order to aid the effective prosecution of war. Furthermore, if there is large scale domestic violence in the provinces, the federal government in the U.S. may come to the aid of the provincial authorities but only if the state legislature has made a request for the same. However, there are instances where the courts have upheld unilateral intervention by the federal government to protect its interests.[4] The Constitutions of France,[5] W. Germany,[6] Eire[7] and Australia[8] have similar provisions for effective control of emergency situations.

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[1] Conway v. Rimmer (1968) A.C. 910, 982. Quoted by Wade and Phillips in Constitutional and Administrative Law, (1977), p 507.

[2] See Halsbury, 4th Ed., Vol. 8, para. 981.

Hence, it is not surprising to find that both India and Canada have provisions under their respective Constitutions which, during a time of national emergency, permit the executive to take such actions as the exigencies of the time may demand. The Indian Constitution, being a relatively new document and written at a time when the whole Sub-continent was torn by communal hatered, border wars and internal

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3. Article 15.

4. Re Debs (1894), 158 US 564.

5. Article 16 of 1958 Constitution.

6. Article 48 of the Weimar Constitution, 1919.

7. Article 28(3) as amended by First Amendment Act, 1939, and Second Amendment Act, 1941.

8. Sections 61 and 119 of the Constitution Act.

strife, devotes one full part (XVIII) elaborating the emergency provisions. These provisions in effect, make the working of the Constitution unitary rather than federal as they allow the federal Parliament to legislate on all matters notwithstanding even the otherwise guaranteed fundamental rights and freedoms. Besides war, the other possible emergencies which the Indian Constitution contemplates are internal disturbances (substituted in 1978 by "armed rebellion"), financial emergency and failure of constitutional machinery in States and makes provisions whereby they could be effectively countered. On the other hand, the B.N.A. Act empowers the federal Parliament to make laws for the peace, order and good government of Canada. This power of the federal Parliament has been given extremely wide judicial interpretation and forms the basis of the legislative authority of Parliament to legislate on any matter for an effective control of the emergency at hand. As the emergency powers under the Canadian System, unlike the Indian Constitution, have not been specifically defined, for about 40 per cent of the time since World War I, legislation was in effect which in the name of emergency, national concern or national crises permitted the federal Parliament to legislate on the matters which otherwise fall under exclusive provincial jurisdiction.[9] The enabling statute in Canada to deal with war, invasion or insurrection, real or apprehended is War Measures Act. It also derives its authority basically from the peace, order and good government clause of Section 91 of the B.N.A. Act. In brief, federal Parliament in India as well as in Canada have constitutional sanction to empower themselves with wide and sweeping powers during a time of national emergency. And these powers are above the checks and balances usually provided by the Constitution.

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[9] See Chevrette and Marx, Comments, (1976) 54 Can. Bar Rev., p 740.

The utility and purpose of emergency powers during war or post war recoupment, which both these countries had occasion to face was unanimously acknowledged. During the two World Wars, the War Measures Act enabled the Executive in Canada to take any action for effective prosecution of war. And it was because of the emergency doctrine, the courts upheld regulatory controls embarked by the government to offset economic losses during the post war period. In a similar manner the proclamation of a state of emergency in India during the war with China (1962) and Pakistan (1965 and 1971 - latter being the Bangla Desh liberation war) provided the extra powers to the Executive which, under such circumstances, were necessary to effectively counter the threat to the sovereignty of the nation. Under the emergency powers, the government of India enacted the Defence of India Act and the Rules framed under the Act were extensively used to detain persons who were involved in activities which were prejudicial to the interest of the Country. Similarly in the 1971 war, the government enacted the Maintenance of Internal Security Act for an identical purpose and all these measures had the unanimous approval of Parliament as well as the people.

However, when the War Measures Act was invoked to counter what the government of Canada described as "apprehended insurrection" in October, 1970, and the government of India declared a state of emergency on the ground of "internal disturbances" in June, 1975, that these measures came under severe criticism and doubts were raised about their purpose and utility. Common grounds of criticism for such a drastic governmental action during peace time were:

(1) That the general situation in the country immediately before the invocation of War Measures Act in Canada and the proclamation of emergency in India did not warrant the deployment of such an extreme measure. As the Governor General's satisfaction under the War Measures Act and the President's satisfaction under the emergency provisions of Indian Constitution regarding the desirability of the use of emergency measures cannot be questioned in a court of law, many were left with the impression that these were designed to give strength and stability to the ruling party by giving it wide discretionary power to do almost anything. In brief, the declaration of a state of emergency was a subterfuge for unconstitutional political maneuvering.

(2) That situation which existed immediately before the declaration of the state of emergency would have been well handled by the Criminal Code and other laws of the land. Moreover, in India, a proclamation of emergency was already in operation on the ground of "external agression" when the June, 1975, proclamation on the ground of "internal disturbances" was made. As both these grounds are a part of the same Article of the Indian Constitution, the consequential additional powers were already available to the government and there was no need for a second proclamation to assume the same powers.

(3) That the arbitrary use of the powers by the executive resulted in unwanted temperance with the civil liberties of the innocent citizens and shook the very foundations of democracy. More so in India, than in Canada the emergency rule saw a rigorous press censorship, coercive family planning campaigns, indiscriminate arrests without trial and

launching of the then Prime Minister's son as a national leader. It is submitted that all the reasons for the adverse criticism of the respective governmental actions may not be completely true, but even if they are valid in part they indicate that there is some flaw in the respective constitutional systems. To improve the existing systems *vis-a-vis* emergency provisions certain modifications, which have been discussed in greater detail in preceeding Chapters, have been summarized later in this part.

Besides war and internal disturbances, emergency measures can also be necessary to counter acute financial crises. While the Indian Constitution contains specific provisions which permit the federal government to take remedial actions, in Canada the authority for such an action again originates from the peace, order and good government clause of Section 91 of the B.N.A. Act. As during a financial emergency, it is the economic considerations which are the motivating factors, the power to deal with such a crises in a uniform manner should definitely be available with the federal government. Moreover, financial emergency is of different nature than that arising out of war or insurrection and the remedial action of the government, under the emergency provisions, do not affect the civil liberties of the citizens.

Another kind of emergency contemplated by the Indian Constitution and fortunately which is absent from the Canadian system, is relating to the breakdown of constitutional machinery in States. This provision was incorporated in the Constitution so that in the event of a political crisis in a province, the President acting on the advice of the Governor of the state could assume the control of the state as a stop-gap arrangement, till the crisis has has been resolved. However, during the 60's and the 70's this provision was repeatedly used to bring down many provincial governments which had political and ideological differences with the federal government.

Besides the affect of the emergency provisions of the two systems outlined above, it is now acknowledged that frequent resort to emergency provisions tends to weaken the concept of federalism. As both India and Canada are sincerely committed to it and in order to ensure that the provincial governments remain legally independent within their own sphere, frequent use of emergency powers should be discouraged and in any case prior consent of the provinces should be obtained before the federal government assumes extra powers.

B. Recommendations

The following proposals for reform arise out of the foregoing study:

(1) There is no need for India to have constitutionally entrenched provisions to deal with a state of emergency arising out of war. The purpose of the emergency provisions is to confer on Parliament an overriding power to deal with the situation. However, as the defence and war powers of Parliament[10] permits it to take almost any action and there is no need for Parliament to assume the same powers by proclaiming a state of emergency. Other federal Constitutions of the United States, Canada and Australia do not have any explicit provision in their Constitutuions to deal with an emergency arising out of war, yet the federal Parliament in these countries exercised vast powers during the two World Wars by virtue of their defence and war powers.

Accordingly, it is fair to assume that if the United States, Canada and Australia, which went through two World Wars, can counter the situation effectively without enacting emergency powers in their Constitutions, so can India.

(2) It is, however, submitted that India would require an emergency provision of a very limited kind. This is because unlike the Constitutions of the United States, Canada and Australia, the distribution of legislative power in India is with reference to three lists, - the union, the state and the concurrent. This would raise the gravest doubt whether Parliament's war, or defence power would enable Parliament to make laws in respect of the matters in the State List and whether the Union of India can take corresponding executive action. During a war, Parliament must have power to make such laws and to take such actions. Therefore, the Indian Constitution must provide that in the event of an emergency arising from war or external aggression or imminent threat have power to make laws in respect of matters referred to in the State List and the Union of India should have power to take corresponding executive action.

(3) "Internal disturbances" or "armed rebellion" as a ground for declaring a state of emergency should be completely eliminated. As demonstrated by the events of the last state of emergency declared on the ground of "internal disturbances", Executive has a tendency to misuse the powers so conferred, thereby putting the innocent citizens under a lot of unwanted strain and agony. Further the substitution of "armed rebellion" in place of "internal disturbances" as a ground for declaring emergency is open to two objections. First there is enough power in the Union of India to put down an armed rebellion by

force, if necessary, by promulgating martial law, for every state and every citizen of state is entitled to repeat force by force. Secondly, armed rebellion is an imprecise concept and would lead to grave abuse, for though the rebellion by a hundred thousand or million people who are armed can be seen to be armed rebellion, the use of force by groups of people who are armed may or may not justify being called an armed rebellion. In short, government has sufficient force at its disposal to put down armed rebellion and hence there is no need for the government to declare a state of national emergency to deal with such a problem.

(4) Articles 358 and 359 of the Indian Constitution permit the suspension of any or all of the fundamental rights while a proclamation of emergency is in operation. It is suggested that only those rights which in any manner obstruct the effective prosectuion of war should be allowed to be suspended and the governmental order of their suspension should recite the reasons for such an action. It is further submitted that even during a war, no restriction should be placed on freedom of press and speech and parliamentary debates. For not only is free discussion and debate necessary for effective direction of the war but is also necessary for maintaining civilian morale. High handed executive action, neglect or apathy can undermine civilian morale; and it is the function of the free press, and a free public and parliamentary debate, to bring such action apathy or neglect to light and to take steps to prevent its recurrence.

(5) Right of life and personal liberty should never be suspended. Preventive detention laws could be brought into effect to deal with erring individuals but a proclamation of emergency should not form a

blanket ban on the individual's right to life and personal liberty. Such a ban, it is submitted, would endanger the very concept of democracy and could be abused by the executive for its vested interest.

(6) Under the existing provisions of the Indian Constitution, the government by virtue of Article 22 can enact preventive detention laws even during peace time. It is submitted that this Article should be so modified that preventive detention laws could be enacted only during a time of war or external aggression.

(7) Provision relating to the failure of constitutional machinery in States (Article 356) which empowers the President to assume control of the State and its functions should be deleted. Such a provision, it is submitted, allows the federal government to interfere in state matters thereby jeopardizing the very concept of federalism.

(8) As most of the suggestions advanced above, would involve policy decisions of the government and constitutional amendments, it is desired that a committee of parliamentarians and eminent jurists should closely examine the purpose, nature and effect of the emergency provisions contained in the Indian Constitution keeping in view the previous proclamations and suggest changes to the government of India.

(9) Under the Canadian Constitution, any change that could take place regarding federal Parliament's authority to legislate under the emergency doctrine can be brought into effect only by the Courts. For, it is their liberal interpretation of the peace, order and good government clause of Section 91 of the B.N.A. Act which permits the federal Parliament to legislate on almost any matter at its will. A narrower construction of the said clause would automatically circumscribe the Parliament's authority to enact emergency measures.

(10) Besides construing the peace, order and good government clause narrowly, the Courts should evolve a clear and precise test for the just use of emergency powers.

(11) It is submitted that certain amendments be made in the nature and form of the War Measures Act. In the first place its application to deal with insurrection real or apprehended be completely eliminated. This recommendation has been influenced by three considerations:

Firstly, such a provision is too convenient a remedy for the Executive to curb or crush any dissent directed against the policies of the government in form of a social or political movement - an exercise which is legitimate in a democratic country. Further it can be used to divert attention from government failures, if a group or organization is trying to make an issue out of it.

Secondly, "insurrection" like "armed rebellion" as a ground for declaring a state of national emergency under Indian Constitution is an imprecise concept, for it is difficult to assess if the organized resistance has any intentions to establish a different government or is merely highlighting genuine grievances. In any case, the government has sufficient machinery to repeal force by force without needing any extraordinary remedy as provided by the present War Measures Act.

Thirdly, a country such as Canada that is well educated and typically placid and is geographically dispersed, could satisfactorily be controlled by Criminal Code legislation and there is no need to have an emergency legislation to deal with internal disturbances or insurrection.

(12) Even if it is decided to retain insurrection, real or apprehended, as a ground to invoke War Measures Act, it is suggested that provision should be made by which the operation of the Act could be confined to a particular region or province depending upon the necessity and consent of provincial legislature. As the situation stands today, if the War Measures Act is invoked to deal with an emergency situation confined to a particular region of the country, its consequential powers, nevertheless, would be available to the executive all over the country.

(13) The War Measures Act should not have complete precedence over the Bill of Rights. Instead, during the time of emergency when War Measures Act is in operation, the executive should be empowered to impose "reasonable" restrictions on civil liberties and what is "reasonable" could be decided by the Courts considering the necessity of the situation.

(14) Finally, the Parliament can exercise effective control over the Executive actions during a period when the War Measures Act is in operation. It could question the government in the House as to the necessity of a particular measure or could press for narrowing the powers delegated to the Governor-in-Council under the Act.

Although section 6(3) of the War Measures Act provides that when an emergency is proclaimed, a motion can be made in either House by ten members asking that the proclamation be revoked and that motion is debated, but for more efficient parliamentary supervision over the government, it is desired, that the proclamation of an emergency should itself operate to automatically require a debate in the House and ratification of the government's action.

C. The Entrenchment Question - Resumé

Ever since the World War II, noticeable interest in, and concern for the protection of certain human rights and fundamental freedoms began to increase in Canada.[11] The United Nations Universal Declaration of Human Rights drafted in 1948 and to which Canada as a signatory subscribed provided the much needed impetus towards a Bill of Rights in this country. After considerable deliberations Mr. Diefenbaker, the then Prime Minister, successfully piloted the Canadian Bill of Rights in 1960 which was designed to provide recognition and protection of human rights and fundamental freedoms.

However, even before the Canadian Bill of Rights was enacted, the courts drawing authority from the preamble to the B.N.A. Act had voiced support for greater protection of individual rights and freedoms. Nevertheless, they did not recognize infringement of individual rights and freedoms as independent and sufficient constitutional doctrine to invalidate any Act of the legislature. They merely indicated the relevance of such rights in a democratic society and nothing more.

With the enactment of the Canadian Bill of Rights, it was hoped that, at least at federal level, greater protection would be afforded to the individual rights and freedoms. However, this was not to be; in 19 years since the Bill of Rights has been enacted the Supreme Court of Canada has only on one occasion[12] found a provision of federal statute in contravention of the Bill of Rights and has declared it inoperative. In other cases[13] in which the Supreme Court of Canada has applied the Canadian Bill of Rights as to protect the civil liberties of an accused, it was not compelled to hold that a law of Canada was inoperative, but rather was able to "construe and apply" it in conformity with the Bill of Rights. On one occasion[14] when the court did find an administrative action inconsistent with the provisions of the Bill, it could not provide the remedy. Besides conservative approach of the courts, the other important reason for ambiguous interpretation of the provisions of the Bill of Rights is that it is unfortunately worded. The provisions of the Bill only state that every law of Canada shall be so construed as not to be in contravention of the rights and freedoms recognized by it. There is no indication if the federal statute which is not in conformity with the provisions of the Bill would be pro-tanto repealed or declared inoperative. The courts have not been conferred with an explicit power to take any such action. Furthermore being an ordinary piece of legislation operative on a federal level, it is seriously deficient in protecting individual rights and freedoms in an effective manner. In brief, the Canadian Bill of Rights is merely a declaratory statute laying down a statutory rule of construction. It is submitted that the protection of civil liberties requires something "more than a mere enunciation of rule of judicial interpretation."

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[11] Tarnopolsky, W.S. The Canadian Bill of Rights, (1975), p 3.

[12] Regina v. Drybones, (1970) S.C.R. 282.

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[13] See Lowry and Lepper v. The Queen (1972), 26. D.L.R. (3d) 224; Leiba v. Minister of Manpower and Immigration (1972), 23 D.L.R. (3d) 476; Brownridge v. The Queen (1972) S.C.R. 926.

[14] Hogan v. The Queen (1975), 2 S.C.R. 574.

Once the weaknesses of the Canadian Bill of Rights were exposed and it was acknowledged that it has failed to accomplish its ideal, search for a better and more effective way to protect individual rights and freedoms began in Canada. And obviously the question of entrenchment came to the fore. The initiative in this direction was taken by Mr. Trudeau who as Minsiter of Justice in Mr. Pearson's Cabinet, for the first time suggested on behalf of the government that Canada should have an entrenched Charter of Human Rights. The White Paper entitled "A Canadian Charter of Human Rights" which was tabled in the House of Commons in February, 1968, made a strong case for entrenchment and outlined the nature of rights which should be included in the Charter. As the question of entrenchment was directly linked with the amending formula for the Constitution and the process of Constitutional revision, it was included for deliberations in the Constitutional conference held that year. Next year the government came out with another policy paper on "The Constitution and the People of Canada" which attempted the phrasing of some of the rights being contemplated to be guaranteed in the charter. The federal government's efforts continued and after thorough research and consideration the matter received at the hands various committees, the Victoria Constitutional Charter of 1971 included a separate part regarding political rights and freedoms. However, because of lack of agreement between the provincial and federal governments no decision could be reached on any matter and this resulted in yet another stalemate. However, the issue was not dropped altogether and continued to receive serious consideration, at least from the federal government. This is evident from the fact that the comprehensive Constitutional Amendment

Bill (C-60) introduced by the Liberal Government in 1978 includes individual rights and freedoms, including linguistic rights and provides an effective machinery for their enforcement by empowering the Courts with an entrenched right of judicial review.

Thus, it appears that there is a growing consensus towards an entrenched Bill of Rights but the lack of agreement on the procedure for amendment is proving to be obtrusive. Regarding the amending procedure it is submitted that the formula evolved at Victoria in 1971 if coupled with a provision for referenda, as suggested by the federal government in 1978, would provide the Canadian Constitution a suitable procedure for amendment. It is yet to be seen as to how viable is Mr. Trudeau's proposal that Parliament can proceed unilaterally to change certain portions of the Constitution and can also entrench individual rights and freedoms. However, with the change of government in Ottawa in May this year, it cannot be said for certain that the new government will proceed with the same enthusiasm towards constitutional reforms as its predecessors did.

The opposition to constitutionally guaranteed Bill of Rights which is predominantly based on the fettish of sovereignty of Parliament and the fear that Courts will have more say in policy matters lacks merit. With world wide increase in concern for human rights and their adequate protection, the issue is not why the individual rights and freedoms should be entrenched in the Canadian Constitution but why not?

D. Recommendations

(1) Canada should immediately entrench individual rights and

freedoms in its Constitution.

(2) Regarding nature of rights which are to be entrenched, it is submitted that Constitutional Amendment Bill includes all those rights and freedoms which are necessary for healthy functioning of democracy in Canada. Broadly such rights and freedoms can be categorized as:

- political and democratic rights and freedoms
- individual legal rights
- freedom of movement of citizens
- egalitarian or anti-discrimination rights
- rights respecting French and English languages
- other subsisting rights and freedoms

(3) The following political freedoms should be guaranteed:

- freedom of conscience and religion
- freedom of thought, opinion, expression and communication
- freedom of peaceful assembly and association

(4) The following rights of the individual should be recognized:

- the right not to be deprived of life, liberty and security of the person except by due process of law
- the right to enjoy property and not to be deprived of it except according to law

(5) Provision should be made for the protection of the following legal rights:

- the right not to be subjected to unreasonable searches and seizures
- the right of a person arrested or detained to be informed promptly of reason thereof, to retain and instruct counsel and to habeas corpus

- the right to protection against self incrimination and double jeopardy
- the right to fair hearing
- the right not to be subjected to retroactive penal laws or punishment

(6) Individual should be guaranteed reasonable access to all public information. What could be classified as "reasonable" should be determined by the courts in case of a controversy.

(7) Protection should be afforded to an individual against discrimination by reason of race, colour, national or ethnic origin, religion, or sex by recognizing the right of the individual to equality before the law.

(8) Regarding linguistic rights, it is submitted that English and French should be constitutionally entrenched as the official languages of Canada and further protection of the linguistic rights as detailed in the Constitutional Amendment Bill should be entrenched.

(9) As the whole issue is linked with the process of Constitutional revision or the "patriation" of the Constitution, it is submitted that immediate steps should be taken in this direction to provide Canada with a Constitution of its own in place of the obsolete B.N.A. Act.

(10) Regarding an amending formula, it is suggested that the formula evolved at Victoria in 1971 if coupled with a provision for referenda to overcome deadlocks should be given serious consideration by the provinces as it gives due importance to regional sentiments and at the same time is reasonably flexible.

(11) The proposal mooted by Mr. Trudeau that Parliament can proceed to make unilateral changes in the Constitution should be given a try and the validity of such an action could be determined by referring the matter to the Supreme Court of Canada.

(12) Along with the entrenchment of individual rights and freedoms, it is suggested that the Supreme Court of Canada and the superior courts of the provinces be entrenched in the Constitution as final court of appeal and courts of general jurisdiction respectively. They should be empowered with extensive right of judicial review, for the guarantee of individual rights and freedoms is meaningless if there is no effective machienry available for their enforcement.

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